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Scott R. Haiber

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ARTICLES

REMOVING THE BIAS AGAINST REMOVAL

Scott R. Haiber⁺

"That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them."¹
"After all, procedure is instrumental; it is the means of effectuating policy."²

I. INTRODUCTION

The dramatic growth in the caseload of federal courts over the last century has been well documented and, in general, bemoaned.³ Nonetheless, those troubled by expanding federal dockets can point to one significant but largely unnoticed success. Throughout the twentieth century, federal courts consistently and methodically limited the availability of federal removal jurisdiction. Coupling supposed statutory ambiguities with judicial presumptions favoring remand to state court, federal courts littered the removal landscape with a daunting array of procedural landmines for the litigator to navigate. These judicially created landmines have kept a large number of cases off the federal docket.

Predictably, procedural obstacles to removal also provide increased opportunities for plaintiffs to manipulate federal jurisdiction in arbitrary ways. Thus, plaintiffs often successfully prevent removal by utilizing such devices as disguising federal claims as state claims, delaying service

⁺ The author, a member of the Maryland Bar and the Delaware Bar, is a principal in the firm of Miles & Stockbridge, P.C.. The views expressed in this article are solely those of the author.

1. *Hagerla v. Miss. River Power Co.*, 202 F. 771, 773 (S.D. Iowa 1912).

2. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 2 (1928).

3. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM*, 53-86 (1996) (describing that growth); see also J. Harvie Wilkinson III, *The Drawbacks of Growth In The Federal Judiciary*, 43 EMORY L.J. 1147, 1147 (1994) ("Unrestrained growth in personnel and jurisdiction is undermining the effective functioning of the federal judiciary."); Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 3 ("The point is that as a result of people looking to the federal courts those courts have become overburdened and the system has become clogged.").

on certain defendants, intentionally omitting jurisdictional information from a complaint or suing non-diverse defendants, one of who will be dropped from the case at a later date.⁴ Apparently, these strategic measures have troubled few. Perhaps this is because the end, a reduced federal docket, justifies the means, artful manipulation of procedural rules, for a philosophically diverse group of interested observers.⁵ “Conservative” champions of federalism presumably find it awkward to criticize devices that preserve the jurisdiction of state courts.⁶ At the same time, the “liberal” plaintiffs’ bar can hardly be expected to criticize tools that make it easier to pursue claims in state court—their preferred venue. Nor do federal judges have much incentive to complain about practices that reduce the workload of overburdened federal courts. Indeed, the only parties with cause to complain about artificial procedural obstacles to removal are those defendants unfortunate enough to trip over them.

Yet gamesmanship has its price.⁷ The arcana of federal removal law requires courts and litigants to waste significant resources researching, litigating, and deciding procedural issues related to forum selection.⁸ More troubling, by encouraging procedural gamesmanship, judicially created obstacles to removal undermine respect for both the courts and for the rule of law.⁹ Some defense attorneys must explain to their clients that they have been denied their right to a federal forum, not for any substantive reason, but because the plaintiff’s attorney in a would-be diversity action strategically waited for more than a year before dismissing a token non-diverse defendant whom the plaintiff never actually intended to prosecute.¹⁰ Other defense attorneys must explain to clients that although the requirements for diversity jurisdiction exist in a given case, removal cannot be effected because a plaintiff artfully elected not to disclose in his complaint the citizenship of the parties.¹¹ These awkward situations occur, and serve as a testament to the fact that federal jurisdiction has become a mere lawyers’ game where form triumphs over substance.

Sadly, this situation is not only illogical and costly, but wholly unnecessary. The root of the problem appears to lie in collective

4. See *infra* Part IV.

5. See *infra* notes 108-10 and accompanying text.

6. See *infra* Part V.B.3.

7. See *infra* Part V.B.4.

8. See *infra* Part V.B.4.

9. *Id.*; see also *infra* Part V.A.

10. See *infra* notes 299-302 and accompanying text.

11. See *infra* Part II.E.

amnesia regarding the origin and purpose of removal jurisdiction.¹² Removal too often is treated as a procedural anomaly that affronts the dignity of state courts and deprives plaintiffs of their “right” to choose a forum.¹³ Moreover, removal increases the number of cases before federal courts involving diversity jurisdiction, which itself often is viewed as an archaic relic that Congress stubbornly refuses to abolish.¹⁴ Federal courts therefore scorn removal as a particularly obnoxious form of federal jurisdiction that should be indulged only when absolutely necessary. More precisely, federal courts employ a battery of legal presumptions in favor of remand that have resulted in artificial procedural barriers to removal.¹⁵

In their zeal to trim the federal docket by limiting removal, some federal courts seemingly have forgotten that removal merely provides a mechanism for transferring to federal court those cases in which both the Constitution and Congress have authorized original federal jurisdiction.¹⁶ Many judges also forget that the federal courts were not created solely for the benefit of plaintiffs.¹⁷ In fact, the Framers intended rights conferred by the Constitution, including the right to litigate certain disputes in a federal forum, to be equally available to all citizens.¹⁸ Removal therefore serves as a necessary device to ensure that plaintiffs alone do not decide which cases federal courts hear.¹⁹ It is only in the past century that federal courts quietly abandoned this notion and discovered the superior right of a plaintiff to select unilaterally the forum of his choice.²⁰

When we recall the true nature and purpose of removal, judicial hostility toward the use of this device becomes difficult to justify. Removal does not deprive plaintiffs of any “right,” but merely affords defendants an equal opportunity to litigate in federal court.²¹ Removal does not affront fundamental principles of federalism. On the contrary, it forms an integral component of the original federal scheme created by the Framers.²² Additionally, removal does not expand federal

12. See *infra* Part II.D.

13. See *infra* Part II.E.1.

14. See *infra* Part IV.B.

15. See *infra* Part IV.B.; see also Part V.

16. See *infra* notes 88-90 and accompanying text.

17. See *infra* notes 398-99 and accompanying text.

18. See *infra* note 406 and accompanying text.

19. See *infra* Part V.B.1.

20. See *infra* Part V.B.1.

21. See *infra* notes 74-79 and accompanying text.

22. See *infra* Part V.B.2.

jurisdiction, but merely allows cases involving federal jurisdiction to be heard in a federal court.²³

Therefore, rather than treating removal as the redheaded stepchild of federal jurisdiction, federal courts should interpret and apply removal statutes in a strictly neutral manner.²⁴ Instead of presuming that all removed cases should be remanded, federal courts should approach removal with the understanding that a plaintiff does not possess a superior "right" to select the forum of his choice.²⁵ Such a judicial change of heart would help to reconcile the practice of removal with its underlying purpose.²⁶ A less hostile judicial view of removal could also arrest, and might even begin to roll back, the proliferation of judicially created procedural obstacles to removal.²⁷ This, in turn, would reduce abusive procedural gamesmanship and the cynicism that goes with it.²⁸ That is the argument presented in this article.

First, however, it is necessary to establish certain underlying factual predicates. Therefore, this article begins by sketching the history of removal from the Judiciary Act of 1789 to the present day.²⁹ That history shows how removal, which was viewed favorably by federal courts in the nineteenth century, came to be viewed as a dangerous and disfavored device in the twentieth century.³⁰ Attention is then paid to several procedural obstacles to removal that have been spawned by federal court presumptions in favor of remand.³¹ The policy justifications that supposedly underly the disfavored status of removal jurisdiction, and that ultimately justify procedural obstacles to removal, are then examined.³² Finally, this article argues for a changed attitude towards removal and for the elimination of judicially created procedural obstacles to the exercise of removal jurisdiction.³³

II. A SHORT HISTORY OF FEDERAL REMOVAL PRACTICE

Reviewing the history of federal removal practice reveals a few items that might surprise many federal litigators. First, for at least a century after the ratification of the Constitution, statutes governing removal

23. See *infra* Part V.B.3.

24. See *infra* Part VI.A.

25. See *infra* Part VI.A.

26. See *infra* Part VI.A.

27. See *infra* Part VI.A.

28. See *infra* Part VI.A.

29. See *infra* Part II.

30. See *infra* Part II.E.2.

31. See *infra* Part V.

32. See *infra* Part V.B.

33. See *infra* notes Part VI.

procedure were construed liberally to avoid a remand based on a procedural defect.³⁴ Second, during this same period, federal courts viewed a defendant's removal right as constitutionally based and certainly no less important than a plaintiff's "right" to select the initial forum.³⁵ Third, judicial hostility toward removal appears to have developed, at least in part, as a byproduct of a more general hostility to diversity jurisdiction.³⁶

A. *Prelude: Diversity Jurisdiction and Ratification of the Constitution*

The history of removal cannot be separated from that of its close kin, diversity jurisdiction. Each doctrine dates back to the birth of the Republic and alternately has expanded and contracted in scope over the last two centuries. Moreover, removal exists for no other purpose than to facilitate the exercise of original jurisdiction—particularly diversity jurisdiction—by the federal courts.³⁷

The notion of diversity jurisdiction first appeared in the so-called "Virginia Plan," which eventually formed the basis for the Constitution of the United States.³⁸ In particular, one of the original resolutions introduced by Edmund Randolph to the Constitutional Convention on May 29, 1787 called for the creation of a national judiciary, "to hear . . . cases in which foreigners or citizens of other States applying to such jurisdiction, may be interested."³⁹ Later, a Committee of Detail appointed to draft the Judicial Article of the Constitution included diversity jurisdiction in its proposal to the Convention.⁴⁰ That language eventually was accepted by the Convention with minor alterations and no visible controversy.⁴¹

When the proposed Constitution was submitted to the States for ratification, Article III, Section 1 stated that, "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."⁴²

34. See *infra* notes 65-88 and accompanying text.

35. See *infra* notes 65-88, 95 and accompanying text.

36. See *infra* notes 256-57 and accompanying text.

37. See *infra* notes 68-77 and accompanying text.

38. See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484-85 (1928).

39. See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 35, 38 (Ralph Ketcham ed., Penguin Books 1986) [hereinafter ANTI-FEDERALIST PAPERS].

40. See Friendly, *supra* note 38, at 486.

41. *Id.*

42. See U.S. CONST., art. III, § 1.

Section 2 of Article III in turn defined the federal “judicial Power” as embracing certain enumerated cases, including those arising under the Constitution or laws of the United States, and those “between Citizens of different States.”⁴³ However, the proposed Constitution did not vest diversity jurisdiction in any particular federal court.⁴⁴ Nor did it mention removal or any other procedure that would allow inferior federal courts to exercise the original jurisdiction authorized by the Constitution.⁴⁵

During the state debates that preceded ratification of the Constitution, the proposed federal judiciary received considerable attention. Federalists argued for an extensive and unified federal judiciary that would protect federal rights, provide for more uniform decision making, and eliminate the confusion that had plagued the post-Revolutionary War period.⁴⁶ As Hamilton warned in *The Federalist Papers*, “[t]hirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.”⁴⁷

Supporters of a strong federal judiciary also specifically supported the inclusion of diversity jurisdiction in Article III, as a means of addressing the problem of local prejudice.⁴⁸ Madison, for example, argued that “a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them.”⁴⁹ Hamilton similarly argued that cases between citizens of different states should be assigned to a federal court “likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.”⁵⁰ Nor was it irrational for participants in pre-ratification debates to entertain fears regarding either the reliability or impartiality of state courts.⁵¹ Indeed, under the Articles of Confederation, some state

43. *Id.* § 2.

44. *See id.*

45. *See id.* art. III.

46. *See, e.g.,* THE FEDERALIST NOS. 22, 78-82 (Alexander Hamilton) (Garry Wills ed., 1982); *see generally* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 62-64 (1966).

47. THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982).

48. *See, e.g.,* Friendly, *supra* note 38, at 492-96.

49. 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (2d ed. 1836).

50. THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982).

51. *See* Michael G. Collins, *Judicial Independence and the Scope of Article III—A View From The Federalist*, 38 U. RICH. L. REV. 675, 697 (2004) (discussing the fears of Hamilton and others regarding state courts).

courts simply declined to enforce federal admiralty decisions.⁵² State courts, particularly those in the South, also were notoriously hostile to out-of-state creditors.⁵³

Of course, not everyone agreed that state court parochialism and unreliability necessitated the creation of a powerful federal judiciary. Anti-Federalists argued for a very limited federal judiciary that would not trample upon the sovereignty of state courts. For example, Patrick Henry, who refused to attend the Convention in Philadelphia because he “smelt a rat,”⁵⁴ viewed the creation of a federal judiciary as the death knell of state courts: “I see arising out of that paper a tribunal that is to be resorted to in all cases, when the destruction of the state judiciaries shall happen; and, from the extensive jurisdiction of these paramount courts, the state courts must soon be annihilated.”⁵⁵ Similarly, “Brutus” remarked that “[p]erhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial [branch].”⁵⁶

Anti-Federalists singled out diversity jurisdiction for particular criticism. They argued that the exercise of federal diversity jurisdiction would cause defendants to incur significant expense in traveling to distant federal courts.⁵⁷ Some critics also feared that diversity jurisdiction could lead directly to the creation of a body of federal law that would supplant state law.⁵⁸ Although history would prove that such fears were not entirely groundless,⁵⁹ they did not prevent the formation of the Union.

Instead, after a full airing of practical, philosophical, and political objections, all thirteen original states eventually ratified a Constitution

52. See Wythe Holt, “*To Establish Justice*”: Politics, *The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1428.

53. See *id.* at 1456. Judge Friendly suggested that the true purpose of diversity jurisdiction was to offer protection not against state courts, but against state legislatures. See Friendly, *supra* note 38, at 495. Indeed, there is evidence that the Founders were concerned with both state laws and the state judiciary. James Wilson, for example, stated in the Pennsylvania debates on the Constitution: “I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island.” 2 ELLIOT, *supra* note 49, at 491. Nevertheless, the statements of Madison, Hamilton, and others expressly referring to bias in the state courts are not easily ignored.

54. See DRINKER BOWEN, *supra* note 46, at 18.

55. See 3 ELLIOT, *supra* note 49, at 542.

56. “BRUTUS,” ESSAY XV (Mar. 20, 1788), reprinted in ANTI-FEDERALIST PAPERS, *supra* note 39, at 308.

57. See Friendly, *supra* note 38, at 490-91.

58. See *id.* at 490.

59. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (holding that federal common law applies to diversity actions), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

that explicitly allowed both for the creation of federal courts and for the exercise of federal diversity jurisdiction.⁶⁰ As Chief Justice Marshall would explain two decades later, the Framers clearly intended diversity jurisdiction to shield non-residents from actual or perceived local prejudice:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.⁶¹

The open question became how federal courts would exercise the diversity jurisdiction authorized by the Constitution.

B. The Judiciary Act of 1789 Authorizes Removal

Article III of the Constitution was not self-executing. Thus, in 1789, the First Congress immediately turned to the creation of a federal judiciary and to the provision of jurisdiction for that judiciary.⁶² As scholars and historians have noted, this project was hardly a mechanical exercise to implement a shared understanding of Article III.⁶³ Instead, Federalists and Anti-Federalists renewed their contest over the appropriate size, function, and jurisdiction of the federal courts.⁶⁴ In the end, the Judiciary Act of 1789 was the result of a compromise. Anti-Federalists acquiesced to the creation of those same lower federal courts that Patrick Henry warned would lead to the annihilation of state courts.⁶⁵ On the other hand, by agreeing to strict limits on the

60. U.S. CONST. art. III, §§ 1, 2.

61. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). See also *Dodge v. Woolsey*, 18 U.S. (18 How.) 331, 354 (1855) (stating that the purpose of diversity jurisdiction is "to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit").

62. For the history of the Judiciary Act of 1789, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). See also STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 62-64 (1993); FRANKFURTER & LANDIS, *supra* note 2, at 2-14; Holt, *supra* note 52; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986).

63. See, e.g., Warren, *supra* note 62, at 123 (summarizing debates).

64. See *id.*

65. See *supra* notes 34-35 and accompanying text.

jurisdiction of lower federal courts, Federalists implicitly conceded that the Constitution did not require those courts to exercise the full jurisdictional grant set forth in Article III.⁶⁶ Thus, as Professor Charles Warren has noted:

[T]he final form of the Act and its subsequent history cannot be properly understood, unless it is realized that it was a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal courts should be given the minimum powers and jurisdiction.⁶⁷

The Judiciary Act of 1789 limited the jurisdiction of inferior federal circuit and district courts to certain narrowly defined categories.⁶⁸ The Act afforded circuit courts diversity jurisdiction, albeit with some qualifications.⁶⁹ Specifically, federal courts were vested with original jurisdiction over diversity cases when more than \$500 was in dispute and when one of the parties resided in the forum.⁷⁰ Like the delegates to the Constitutional Convention, the members of the First Congress intended diversity jurisdiction to address the potential problem of local prejudice.⁷¹

The First Congress also faced a practical problem: federal courts cannot meaningfully protect against local prejudice if a plaintiff simply can avoid a federal forum by filing his lawsuit in state court. In other words, from a defendant's perspective, the theoretical existence of diversity jurisdiction is meaningless unless a procedural mechanism allows a defendant to invoke its power over that lawsuit. Section 12 of the Judiciary Act established this mechanism by authorizing removal to federal court of any suit "commenced in any state court against an alien, or by a citizen of the state in which suit is brought against a citizen of another state, and [where] the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs"⁷² Unfortunately, scant evidence exists regarding the drafting of section 12. We know that the original Draft Bill of the Judiciary Act of 1789 allowed for the removal of any action satisfying the requirements of diversity

66. See Warren, *supra* note 62, at 67 (discussing the position of the "broad pro-Constitution men" regarding the extent of federal jurisdiction).

67. See *id.* at 53.

68. Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76-77, 78-79.

69. See *id.* § 11, 1 Stat. at 78.

70. See *id.*

71. See, e.g., Warren, *supra* note 62, at 83 (asserting that there is "not a trace of any other purpose").

72. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The Act also allowed the removal of certain disputes concerning title to land. *Id.* § 12, 1 Stat. at 80.

jurisdiction.⁷³ However, at some time prior to its adoption, the Senate amended the language to provide the availability of removal only where the plaintiff brought suit in his own state against an out-of-state defendant.⁷⁴ This restriction remains consistent with the notion that the original intent of removal was to address cases in which a defendant might face local prejudice in a state court.

Despite the lack of legislative history regarding the drafting of section 12, Justice Story's opinion in *Martin v. Hunter's Lessee* provides evidence that the federal courts soon accepted that Congress created removal as a procedural vehicle to implement diversity jurisdiction and to level the playing field between plaintiffs and defendants:

The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.⁷⁵

Indeed, allowing a plaintiff to "always elect the state court" would render the protection afforded by diversity jurisdiction ineffective for a defendant and "[s]uch a state of things can, in no respect, be considered as giving equal rights."⁷⁶ Congress therefore authorized removal so that a defendant would not be "deprived of all the security which the constitution intended in aid of his rights."⁷⁷ Thus, Justice Story's opinion views removal as a procedural device intrinsically necessary for the protection of a defendant's *equal* and *constitutional* right to litigate certain claims in federal court.

Justice Story was not alone in this view. Rather, for roughly a century after *Martin v. Hunter's Lessee*, most federal courts treated removal as a necessary procedural mechanism affording defendants an equal opportunity with plaintiffs to select a federal forum.⁷⁸ Removal merely provided "an indirect mode" for a federal court to exercise diversity jurisdiction,⁷⁹ thereby implementing the Constitution's vision of federal jurisdiction.

73. See Warren, *supra* note 62, at 90-91.

74. See *id.* at 91.

75. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 348 (1816).

76. *Id.* at 348, 349.

77. *Id.* at 349.

78. See *infra* notes 80-84 and accompanying text.

79. *Railway Co. v. Whitton*, 80 U.S. (13 Wall.) 270, 287 (1871). The Court stated:

This is not to suggest that federal courts ignored the requirements of the removal statutes. But when applying those statutes, courts focused on fundamental questions of jurisdiction, not procedural niceties—substance, not form.⁸⁰ A case not falling within the terms of the removal statute would be remanded.⁸¹ Conversely, where a case's facts implicated the federal courts' jurisdiction, technical matters would not defeat removal. For example, in *Gordon v. Longest*, the United States Supreme Court held that a state court reviewing a facially valid removal petition lacks discretion to deprive a defendant of the right to a federal forum.⁸² Instead, the opportunity for a federal forum was equally available to both plaintiffs and defendants:

One great object in the establishment of the Courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated, if a state judge, in the exercise of his discretion, may deny, to the party entitled to it a removal of his cause.⁸³

In other words, judges could not presume to deprive a defendant of the right to a federal forum. The Constitution treated this right as no less important than the right of the plaintiff to select the initial forum.⁸⁴

Although the federal courts protected a defendant's access to a federal forum, Congress occasionally expanded the range of cases to which

The protection intended against [local prejudice] to non-residents of a State was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and *where the suit was commenced in a State court a like election to the defendant afterwards.*

Id. at 289 (emphasis added).

80. See, e.g., *infra* notes 119-26 and accompanying text.

81. See *Beardsley v. Torrey*, 2 F. Cas. 1188, 1189 (Pa. D. 1822) (remanding case in which all defendants did not join in removal, and stating that, “[t]he judiciary cannot proceed upon grounds of expediency, but must execute the laws as they are found written”); *Smith v. Rines*, 22 F. Cas. 639, 644 (Mass. Dist. Ct. 1836) (requiring all defendants to join in removal petition); *but see Ward v. Arredondo*, 29 F. Cas. 167, 169 (D.N.Y. 1825) (stating that although all defendants must consent to removal, they need not join in initial removal petition when they are served at different times).

82. *Gordon v. Longest*, 41 U.S. 97, 104 (1842).

83. *Id.*

84. See, e.g., *Gaines v. Fuentes*, 92 U.S. 10, 19 (1875) (protecting against local prejudice is provided by allowing the plaintiff to bring a diversity action in federal court and providing “a like election to the defendant”); *Case of Sewing Machine Cos.*, 85 U.S. 553, 573-74 (1873) (finding that the removal privilege is given to defendant in diversity case, “as the plaintiff, when he institutes his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial”); *Kanouse v. Martin*, 56 U.S. 198, 209 (1853) (noting defendant’s “right” and “privilege” of removal cannot be abridged by state court actions subsequent to filing of a facially valid removal petition).

removal applied. During the War of 1812, for example, a temporary act was passed allowing removal of actions against customs officers, military personnel, or other federal officials.⁸⁵ Subsequently, the Force Act of 1833 allowed for the removal of cases against United States revenue officers.⁸⁶

The period between the ratification of the Constitution and the end of the Civil War thus established removal as a simple procedural mechanism that allowed all citizens equal access to the federal judiciary. Removal ensured that plaintiffs would not have a monopoly on federal jurisdiction. Prior to the Civil War, neither Congress nor the federal courts treated removal as a pernicious or dangerous device that needed restraint. To the contrary, federal courts interpreted removal statutes liberally, while Congress authorized the expanded use of removal for special cases.⁸⁷ Thus, as the U.S. Supreme Court later remarked, removal “was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since.”⁸⁸

C. *The Reconstruction Experiment with Expanded Removal*

The first significant changes to removal practices occurred during and immediately following the Civil War. Congress extended both the original and the removal jurisdiction of the federal courts in an effort to expand the reach of the federal judiciary to protect federal officers and freed former slaves.⁸⁹ More generally, the growth of federal jurisdiction was a natural corollary to the increased power of the national government that resulted from the Confederacy's defeat in the war.⁹⁰

With respect to removal, the process began with the Act of March 3, 1863 that allowed for the removal of cases brought against United States officials for actions taken in their official capacity during the Civil War.⁹¹

85. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198; Act of Mar. 3, 1815, ch. 94, § 6, 3 Stat. 231 (expired April 1815).

86. Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632; *see also* JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS 5 (5th ed. 1889) (discussing the Force Act); *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934) (same).

87. *See* DILLON, *supra* note 86, at 2, 5.

88. *Tennessee v. Davis*, 100 U.S. 257, 265 (1880); *see also Gaines*, 92 U.S. at 18 (“The validity of this [removal] legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government.”).

89. For general background concerning federal procedure during the reconstruction period, *see* FRANKFURTER & LANDIS, *supra* note 2, at 56-69, and STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968).

90. FRANKFURTER & LANDIS, *supra* note 2, at 56-69.

91. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756.

It was followed by enactment of the Separable Controversy Act of 1866⁹² and the Prejudice of Local Influence Act of 1867,⁹³ two statutes that further expanded the list of removable cases. The process culminated in The Removal Act of 1875, a law that not only vested lower federal courts with original federal question jurisdiction for the first time, but also effected fundamental changes to the removal statute: (1) it expanded the circuit court's removal power to include cases involving the newly conferred federal question jurisdiction; (2) it allowed plaintiffs, as well as defendants, to effect removal; (3) it allowed removal of an entire lawsuit containing any "controversy" between citizens of different states; and (4) it explicitly provided for the appellate review of remand orders.⁹⁴

In interpreting the removal statutes as amended by these acts, federal courts continued to reflect Justice Story's view that removal was a procedural mechanism intended to ensure that plaintiffs and defendants had equal opportunities to invoke the original jurisdiction of the federal courts, which now included matters involving federal questions.⁹⁵ In keeping with the remedial purpose of removal statutes, courts often excused defects in technical matters of removal procedure, even when those defeats went to matters arguably determinative of federal jurisdiction.⁹⁶ This is demonstrated by a federal court's explanation of its decision allowing a defendant to amend a removal petition to add jurisdictional allegations.⁹⁷

The court stated that there was no reasonable basis for distinguishing between cases filed in federal court and those removed to federal court, "nor any reason for holding a more rigid rule as to jurisdiction in removal causes than others."⁹⁸ Rather, because a plaintiff in federal court could amend his complaint to establish jurisdiction, the defendant should

92. Act of July 27, 1866, ch. 288, 14 Stat. 306 (amended 1867).

93. Act of Mar. 2, 1867, ch. 288, 14 Stat. 558.

94. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, 471; *see generally* FRANKFURTER & LANDIS, *supra* note 2, at 64-69; *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 204 (1877) ("The act of 1875 has made some radical changes in the law regulating removals.").

95. *See, e.g., Deford, Hinkle & Co. v. Mehaffy*, 13 F. 481 (W.D. Tenn. 1882).

96. *See, e.g., Ayers v. Watson*, 113 U.S. 594, 598-99 (1885) (stating that the time limit on removal could be waived by the plaintiff because "it is not, in its nature, a jurisdictional matter, but a mere rule of limitation"); *Removal Cases*, 100 U.S. 457, 478 (1879) (unverified petition excused); *Ins. Co. v. Dunn*, 86 U.S. 214, 224 (1873) ("The [removal] statute is remedial, and must be construed liberally."); *Harris v. Delaware & L. & W. R. Co.*, 18 F. 833, 836 (D. N.J. 1884) (finding that neither a "perfect" petition nor a bond is required for removal; such matters are only matters of practice, not jurisdictional requirements).

97. *Deford*, 13 F. at 487.

98. *Id.*; *see also Bondurant v. Watson*, 103 U.S. 281, 287 (1880) (stating that there is no reason "why a party to such a controversy should not enjoy his constitutional right of having his case tried by a court of the United States").

receive a similar opportunity for his removal petition.⁹⁹ The court further explained:

[I]t is a refinement of delicacy to hold that the merely directory provisions regulating the mode of procedure are so rigid in their character that they become *jurisdictional*, are beyond correction, and fatal to the jurisdiction if defective. This theory can only be sustained on the notion that there is something extraordinary in this proceeding—so much so that it is to be discouraged and not favored by the courts, as something that is harsh and out of the ordinary course of remedial rights. I do not so regard it.¹⁰⁰

A federal court could not convert mere rules of practice into preconditions for the exercise of federal jurisdiction.¹⁰¹

Expanded removal opportunities and the creation of federal question jurisdiction greatly increased the reach of the federal courts.¹⁰² At the same time, commercial development following the Civil War increased the volume of litigation.¹⁰³ This combination resulted in exploding federal dockets. As one commentator noted in 1889, “the small tide of litigation that formerly flowed in federal channels has swollen into a mighty stream.”¹⁰⁴

Not everyone welcomed this development. Many considered federal courts as the friend of creditors and the bane of debtors.¹⁰⁵ Indeed, Eastern corporate interests undoubtedly sought to avoid inconsistent state law and unfriendly state judicial systems by litigating in the less hostile and more predictable federal courts.¹⁰⁶ Moreover, by removing a case to a sometimes distant federal courthouse, corporate defendants obtained a tactical advantage over individual plaintiffs who could not afford the travel or litigation expense.¹⁰⁷

99. *Deford*, 13 F. at 487.

100. *Id.* at 490-91.

101. *Id.* at 491.

102. See FRANKFURTER & LANDIS, *supra* note 2, at 60.

103. *Id.*

104. DILLON, *supra* note 86, at 2-3. A further impetus to the expansion of federal jurisdiction was the Supreme Court's holding that every lawsuit by or against a federally chartered corporation implicates federal question jurisdiction. See *Pacific R.R. Removal Cases*, 115 U.S. 1, 11 (1885).

105. See, e.g., RUSSELL R. WHEELER & CYNTHIA HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* 18 (2d ed. 1994) (noting that some critics believed, “not without some evidence, that the federal courts were too sympathetic to commercial interests, too eager to frustrate state legislative efforts designed to help farmers and workers”).

106. See generally Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments To The Federal Removal Statute*, 43 EMORY L.J. 83, 94-97 (1994).

107. See *id.*

The inevitable reaction was criticism of expanding federal jurisdiction.¹⁰⁸ Although some argued that the problem required an expansion of the federal judiciary to deal with the new glut of litigation, a more common reaction was to press for a curtailment of all federal jurisdiction, including removal jurisdiction.¹⁰⁹ In fact, several unsuccessful attempts quickly were made to retreat from the expansive grant of removal jurisdiction conferred by the 1875 Removal Act.¹¹⁰

D. The Experiment Abandoned: The Act of 1887 Returns Removal to Its Pre-Civil War Status

In 1887, twelve years after greatly expanding federal jurisdiction with the Removal Act of 1875, Congress largely reversed the experiment.¹¹¹ The Judiciary Act of 1887 (as corrected in 1888) stripped all plaintiffs and resident defendants in diversity actions of the ability to remove a case to federal court—a statutory restriction that remains in place today.¹¹² Through this amendment, Congress largely restored the device of removal to its original purpose of providing a procedural vehicle for defendants to litigate a case implicating the original jurisdiction of federal court. Congress also raised the monetary threshold for all federal jurisdiction cases to \$2,000.¹¹³ Notably, however, Congress did not prohibit the removal of federal question cases.¹¹⁴ Thus, although more restrictive than the Act of 1875, the Act of 1887 allowed for the removal of a greater variety and number of cases than did the Judiciary Act of 1789.

108. See FRANKFURTER & LANDIS, *supra* note 2, at 83-86.

109. See *id.* at 83-84.

110. See *id.* at 89.

111. Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (as corrected by Act of Aug. 13, 1888, 25 Stat. 433).

112. *Id.*

113. *Id.*

114. *Id.*

Contemporary courts¹¹⁵ and commentators¹¹⁶ recognized that the purpose of the 1887 amendments was to limit removal. Also at this time, the notion of strictly construing removal first crept into federal case law.¹¹⁷ This strict construction, however, would apply only to the additional limitations placed upon removal by the 1887 Act.¹¹⁸ As such, federal courts did not suggest that the original requirements for removal contained in the Judiciary Act of 1789 should require more strict application as a result of the 1887 amendments.

In applying the revised statutes, federal courts were careful not to overstate the case for limiting removal. Through the 1887 amendments, Congress may have reversed, in part, recent legislation allowing increased use of removal, but it had not altered the basic premise that defendants and plaintiffs possess an equal constitutional right to a federal forum.¹¹⁹ Nor did the 1887 revisions to the removal statutes suggest that the courts could erect new and additional hurdles not found in the text of the recent amendments themselves.¹²⁰ Instead, removal simply had been restored to the status it enjoyed under the Judiciary Act of 1789.¹²¹

115. See *Smith v. Lyon*, 133 U.S. 315, 319 (1890) (noting that the evident purpose of the 1887 Act was "to restrict rather than to enlarge the jurisdiction of the Circuit Courts"); *Woolf v. Chisolm*, 30 F. 881, 881 (S.D.N.Y. 1887) ("It was the obvious purpose of the Act of March 3, 1887, to restrict the right of removal of an action from a state court to the circuit court, as it then existed."); *Dwyer v. Peshall*, 32 F. 497, 498 (S.D.N.Y. 1887) ("The amendments of 1887 were plainly meant to restrict removals from state to federal courts.").

116. See, e.g., DILLON, *supra* note 86, at 3. These commentators asserted:

[The Act's] apparent design is to stem the tide of litigation pouring into the Federal courts, to bar out a considerable portion of the cases which had hitherto found their way into those tribunals, to restrict the right of removing causes within much narrower limits than it had filled under the law of 1875, and to discourage litigants from seeking this resort in the cases where it is still allowed.

Id.

117. E.g., *Dwyer*, 32 F. at 498 (noting that the new removal statute "should be strictly construed against any one seeking to evade the *additional limitations* which it puts upon the right of removal.") (emphasis added).

118. *Id.*

119. See, e.g., *Arrowsmith v. Nashville & D.R. Co.*, 57 F. 165, 170 (N.D. Tenn. 1893) ("The right to remove is a constitutional right . . .").

120. Cf. *Lee v. Chesapeake & Oh. Ry. Co.*, 260 U.S. 653, 660 (1923). The Court held: We recognize that one purpose of the act of 1888 was to contract the jurisdiction of the Circuit Courts and that due regard should be had for this in interpreting indefinite or ambiguous provisions; but we think it affords no basis for subtracting anything from provisions which are definite and free from ambiguity.

Id.

121. Cf. DILLON, *supra* note 86, at 23 (stating that the intent of the Act was "to return to the earlier standards, and fix[] the lines of jurisdiction at points very similar to those established by the Judiciary Act [of 1789]").

An example of the prevailing attitude towards removal in the late nineteenth century is provided by *Texas & Pacific Railway Co. v. Cody*.¹²² In that 1897 decision, the U.S. Supreme Court held that the defendant could remove even where the plaintiff's complaint mistakenly alleged that the parties were not diverse.¹²³ To allow the plaintiff to profit from such an inaccurate allegation would "cut off *defendant's constitutional right* as a citizen of a different state than the plaintiff, to choose a federal forum" ¹²⁴ In a similar vein, the Supreme Court held in *Powers v. Chesapeake & Ohio Railway Co.* that the time for filing a removal petition is not jurisdictional, but merely "modal and formal."¹²⁵ Thus, federal courts continued to apply removal procedures in a way that would not "let the nominal prevail over the actual—or follow the letter rather than the spirit."¹²⁶

Moving into the twentieth century, the decision by the U.S. Supreme Court in *Lee v. Chesapeake & Ohio Ry. Co.*,¹²⁷ illustrates that, as late as 1923, federal courts remained cognizant of the need to avoid defeating a defendant's removal right by unduly strict construction of removal statutes.¹²⁸ In that case, the plaintiff sought to defeat the removal on the grounds that the statutory venue rules in place at the time precluded the defendant from removing to the federal court of a district in which neither party resided.¹²⁹ The U.S. Supreme Court rejected this argument, finding that the right of removal could not be abridged beyond restrictions explicitly found in the text of the amended statutes:

[W]hile the comparison [between the removal acts of 1875 and 1888] shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be effected. Certainly there is nothing in this which suggests that the plain terms in the act of 1888—by which it declared that any suit "between citizens of different states" brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State"—should be taken otherwise than according to their natural or ordinary signification.¹³⁰

122. *Tex. & Pac. Ry. Co. v. Cody*, 166 U.S. 606 (1897).

123. *Id.* at 610-11.

124. *Id.* at 609 (emphasis added).

125. 169 U.S. 92, 99 (1898).

126. *San Antonio Sub. Irrigated Farms v. Shandy*, 29 F.2d 579, 581 (D. Kan. 1928) (holding that a counterclaim-defendant may remove action although he was not regarded as a "defendant" under state law).

127. 260 U.S. 653 (1923).

128. *Id.* at 660.

129. *Id.* at 654.

130. *Id.* at 660-61 (emphasis added).

Moreover, the Court noted that although the Act of 1887 was narrower than the Act of 1875, it was, in fact, broader than the removal provision of the original Judiciary Act of 1789.¹³¹ Although a different result would “materially relieve the overburdened dockets of the District Courts,” only Congress—not the courts—could impose further limits on removal.¹³²

Overall, federal courts, including the United States Supreme Court, did not view the post-Civil War adjustments to removal statutes as fundamentally altering the nature of the device.¹³³ Courts continued to recognize a defendant’s equal and constitutional right to a federal forum.¹³⁴ On the whole, they also continued to interpret the removal statutes, like other remedial statutes, liberally.¹³⁵ The one caveat was that the particular restrictions imposed by the 1887 Act were strictly construed so as to return removal to its original roots.¹³⁶ The amendments of 1887 and 1888 thus returned removal practice to its prior position under the Judiciary Act of 1789; the amendments did not authorize further judicially constructed restrictions upon removal.¹³⁷

E. Twentieth Century Federal Courts Stigmatize Removal

1. A Split Emerges Over Whether to Favor Removal or Remand

Federal removal statutes remained relatively unchanged from the Act of 1887 until the conclusion of the Second World War. Although Congress reorganized the removal statute in 1911,¹³⁸ few substantive changes were made at that time impacting removal jurisdiction.¹³⁹ Instead, removal jurisdiction generally remained available in four classes of cases: (1) federal question; (2) diversity or alienage; (3) separable

131. *Id.* at 661.

132. *Id.*; see also *Ill. Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 330 (1909) (Day, J., dissenting) (finding that “the Courts of the United States should not interfere with the jurisdiction of the state courts in cases properly within the same, and the Federal courts should be equally vigilant to defeat all fraudulent devices or attempts to avoid the jurisdiction of the Federal courts”); *Cochran v. Montgomery County*, 199 U.S. 260, 273 (1905) (indicating that although the purpose of 1887 Amendment was to restrict removal, “this was largely accomplished in the matter of removals by withholding the right from plaintiffs”).

133. See, e.g., *Tex. & Pac. Ry. Co.*, 166 U.S. 606, 609 (1897).

134. *Id.*

135. See *Ayers v. Watson*, 113 U.S. 594 (1885); *Ins. Co. v. Dunn*, 86 U.S. 214 (1872).

136. See *Dwyer v. Peshall*, 32 F. 497, 498 (S.D.N.Y. 1887).

137. See *id.*

138. See JUD. CODE § 28 (1911), 28 U.S.C. § 71 (1940).

139. See 16 MOORE’S FEDERAL PRACTICE § 107 App. 100[2] (3d ed. 2003) [hereinafter MOORE’S FEDERAL PRACTICE].

controversy; and (4) local prejudice.¹⁴⁰ The procedures used by defendants to invoke removal jurisdiction also remained largely unchanged until 1948.¹⁴¹

Nevertheless, while the removal statutes themselves did not greatly change in the first half of the twentieth century, judicial attitudes towards those statutes underwent a transformation that was subtle yet radical.¹⁴² Gradually, almost imperceptibly, federal courts stopped treating removal as a procedural device that protected a defendant's equal and constitutionally-based right to a federal forum.¹⁴³ Instead, in the eyes of many federal judges, removal degenerated into a procedural anomaly that deprived a plaintiff of his superior "right" to select the forum of his choice.¹⁴⁴

The seeds of this doctrinal shift lay in a seemingly innocuous 1886 decision by a federal Circuit Court. In *Kessinger v. Vannatta*,¹⁴⁵ the court ruled that a defendant saloon owner could not remove a nuisance action despite his contention that the attachment of his business would deprive him of his property without due process of law.¹⁴⁶ In rendering its decision, the court stated that if it remanded the case, the defendant could appeal to the U.S. Supreme Court.¹⁴⁷ Therefore, the court deemed it the "wiser course" to remand, given that federal jurisdiction was doubtful.¹⁴⁸

Five years later, a district court in Nebraska considered this proposition in greater detail in *Fitzgerald v. Missouri Pacific Railway Co.*¹⁴⁹ In that case, the court expressly rejected the defendant's argument that doubtful cases should be decided in favor of removal.¹⁵⁰ Instead, relying heavily on *Kessinger*, the court stressed the supposed inefficiency of retaining federal jurisdiction in questionable cases.¹⁵¹ The court presumed remand was appropriate in such instances because "[t]he benefit of a reasonable doubt should never be given to a practice that protects and fosters litigation and multiplies costs."¹⁵²

140. See 28 U.S.C. § 71 (1940).

141. See 16 MOORE'S FEDERAL PRACTICE, *supra* note 139, at § 107 App. 100[1] [2].

142. See, e.g., *Kessinger v. Vannatta*, 27 F. 890 (S.D. Iowa 1886).

143. See *id.*

144. See *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 F. 812 (D. Neb. 1891).

145. *Kessinger*, 27 F. at 890.

146. *Id.* at 891.

147. *Id.*

148. *Id.*

149. 45 F. 812 (D. Neb. 1891).

150. *Id.* at 819-21.

151. *Id.* at 821.

152. *Id.*

Subsequently, other federal courts also have held for remand of cases of doubtful federal jurisdiction.¹⁵³ This prudential rule largely was based on practical considerations rather than federalism or a plaintiff's superior right to select a forum.¹⁵⁴ As one court summarized the emerging view: "It is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it here, and go through all the forms of trial when the jurisdiction is doubtful."¹⁵⁵ In other words, these courts believed that a rule favoring remand would prove administratively efficient and would avoid the imposition of unnecessary costs upon both courts and litigants.¹⁵⁶

Not all federal courts accepted this logic. The Eighth Circuit, for example, offered a particularly powerful rejoinder in *Boatmen's Bank of St. Louis v. Fritzen*.¹⁵⁷ In the course of determining whether separable controversies existed to support removal, the court held that presumptions against removal were improper, and therefore rejected both *Kessinger* and *Fitzgerald*.¹⁵⁸ First, the Court noted that *Kessinger* was decided before Congress revoked the right to appeal a remand decision.¹⁵⁹ Under the statutory framework as it existed at the time of *Kessinger*, a decision remanding a case was immediately reviewable, but a decision denying remand could only be reviewed on appeal at the end of the case.¹⁶⁰ By the time of *Boatmen's*, however, the situation effectively had been reversed.¹⁶¹ Thus, the *Boatmen's* court correctly observed that "a party who is deprived of his right to the trial of a

153. See, e.g., *Western Union Tel. Co. v. Louisville & N.R. Co.*, 201 F. 932, 945 (E.D. Tenn. 1912) (stating "if there be any substantial doubt as to Federal jurisdiction the cause should be remanded, and jurisdiction retained only where it is clear"); *Shane v. Buttle Elec. Ry. Co.*, 150 F. 801, 812 (D. Mon. 1906) (stating that "the statutes of removal should be construed not in a way to authorize the exercise of jurisdiction where the question is doubtful . . ."); *Heller v. Ilwaco Mill & Lumber Co.*, 178 F. 111, 112 (D. Or. 1910) (stating that the 1887 Amendment "was designed to contract the jurisdiction of the federal courts, and the tendency is to construe it strictly against the right of removal"); *Concord Coal Co. v. Haley*, 76 F. 882, 882 (D.N.H. 1896) ("Cases in which our jurisdiction is in doubt should be remanded to the court from which they are removed.").

154. See, e.g., *Shane*, 150 F. at 812; *Western Union*, 201 F. at 945. See also *Concord Coal*, 76 F. at 882 (stating that the rule "results naturally" from a judicial system where state courts decide the extent of individual rights).

155. *Shane*, 150 F. at 812 (quoting *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 F. 812 (D. Neb. 1891)).

156. See *id.*

157. 135 F. 650 (8th Cir. 1905).

158. *Id.* at 653-54.

159. *Id.* at 653.

160. *Id.*

161. *Id.* at 653-54.

controversy in the federal court by an erroneous order which remands it to a court of a state is now left without remedy.”¹⁶²

Echoing the views of Justice Story and other nineteenth century jurists, the Eighth Circuit also stressed that the right of removal “is of sufficient value and gravity to be *guarantied by the Constitution* and the acts of Congress.”¹⁶³ This constitutionally-based right, the court concluded, could not simply be ignored by federal courts seeking a more efficient decision-making process:

No sound reason occurs why those whose oaths and duty require them to enforce this Constitution and these laws, and to sustain and give effect to this valuable and important right, should resolve every doubt against the enforcement of the Constitution and the Acts of Congress, and against the protection and exercise of the right.¹⁶⁴

Accordingly, as the *Boatmen's* court¹⁶⁵ and others following its holding recognized,¹⁶⁶ removal is a valuable constitutional right, and because a defendant has no effective appeal from a remand order, no presumption against removal should exist. Furthermore, even those courts that did not expressly adopt *Boatmen's* nevertheless struck a middle position that fell short of a strong presumption in favor of remand.¹⁶⁷

162. *Id.* at 653 (quoting *Mo. Pac. Ry. Co. v. Fitzgerald*, 160 U.S. 556, 581-82 (1896)).

163. *Id.* at 655 (emphasis added); see, e.g., *Bley v. Travelers Ins. Co.*, 27 F. Supp. 351, 357 (S.D. Ala. 1939) (stating that the removal right is both constitutional and statutory); *Houlton Sav. Bank v. Am. Laundry Mach. Co.*, 7 F. Supp. 858, 862 (D. Me. 1934); *Taylor v. Scarborough*, 56 F.2d 281, 282 (E.D.N.Y. 1932); *McMillen v. Indem. Ins. Co. of N. Am.*, 8 F.2d 881, 883 (W.D. Mo. 1925); *Todd v. S.A. Healy Co.*, 49 F. Supp. 584, 587 (E.D. Ky. 1943).

164. *Boatmen's Bank of St. Louis v. Fritzen*, 135 F. 650, 654 (8th Cir. 1905).

165. See *Farmers' Bank & Trust Co. of Hardinsburg, Ky. v. Atchison, T. & S. F. Ry. Co.*, 25 F.2d 23, 31 (8th Cir. 1928) (following *Boatmen's*).

166. See *Bley*, 27 F. Supp. at 358 (following *Boatmen's* and noting that removal is a right provided “by the Constitution and the acts of Congress”); *Houlton Sav. Bank*, 7 F. Supp. at 863 (denying remand and stating: “If I am wrong, the error can be corrected”); *Bon v. Midwest Refining Co.*, 30 F.2d 410, 413 (D. Wy. 1929) (following *Boatmen's*); *McLaughlin v. W. Union Tel. Co.*, 7 F.2d 177, 184 (E.D. La. 1925) (“Where removability is doubtful, the court should not remand, because there is no relief by appeal from an order remanding.”); *Niccum v. N. Assoc. Co.*, 17 F.2d 160, 164 (D. Ind. 1927) (holding that doubts should be resolved in favor of removal); *Chicago, R.I. & P.R. Co. v. Kay*, 107 F. Supp. 895, 906 (S.D. Iowa 1952) (finding itself “strongly persuaded” by *Boatmen's*); *Drainage Dist. No. 19, Caldwell County v. Chicago, M. & St. P. Ry. Co.*, 198 F. 253, 264 (D. Mo. 1912) (re-affirming presumption in favor of removal).

167. See, e.g., *Smith v. Gilliam*, 282 F. 628, 633 (W.D. Ky. 1922) (finding the court should order remand unless it is “fairly clear” that removal was proper); *Eddy v. Chi. & N.W. Ry. Co.*, 226 F. 120, 125-26 (D. Wis. 1915) (quoting *Boatmen's* and stating that “[t]he presumption against . . . [removal] jurisdiction is not to be carried to an unreasonable extent”).

2. Shamrock Oil Establishes the Disfavored Status of Removal

This uneasy tension in the federal courts continued throughout the first few decades of the twentieth century.¹⁶⁸ An opportunity to resolve the split finally presented itself in *Shamrock Oil & Gas Corp. v. Sheets*.¹⁶⁹ In *Shamrock Oil*, the specific question before the Court was whether a plaintiff could remove a counterclaim.¹⁷⁰ Turning to the history of federal removal practice, the Court noted that the Judiciary Act of 1789 did not allow for such removal.¹⁷¹ Although the 1875 Act permitted plaintiffs to remove, that right was taken away by the Act of 1887.¹⁷² The Court held that this indicated congressional intent to “narrow the federal jurisdiction on removal by reviving in substance the provisions of § 12 of the Judiciary Act of 1789”¹⁷³ Accordingly, it would be inconsistent with congressional intent to allow removal to occur under circumstances where it had not been available under the Judiciary Act of 1789.¹⁷⁴

The Supreme Court could have ended its review there, but it chose not to do so. Turning to questions of policy, the Court ironically avoided any discussion of the split in the federal courts over whether judicial efficiency was promoted by a rule favoring remand. Instead, *Shamrock Oil* announced two new policy reasons to limit removal.¹⁷⁵ First, the Court perceived a general post-1887 congressional hostility toward expanded federal jurisdiction, noting that “[n]ot only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, *but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.*”¹⁷⁶ Thus, removal jurisdiction was restricted not only because of congressional intent in the Act of 1887, but also because of what was perceived as a more general congressional hostility to all “jurisdiction of federal courts.”¹⁷⁷ In other words, strict construction of removal statutes could serve as a proxy for generally limiting federal jurisdiction.

168. The Supreme Court did not address the split until over thirty-five years after *Boatmen's*. See generally *Boatmen's*, 135 F. at 650; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

169. *Shamrock Oil*, 313 U.S. at 100.

170. *Id.* at 103.

171. *Id.* at 105-06.

172. *Id.* at 106.

173. *Id.* at 107.

174. *Id.*; cf. *supra* note 121 (noting authority contemporaneous with the Act of 1887 that suggested that the purpose of the Act was to restore removal to its position under the Judiciary Act of 1789).

175. *Shamrock Oil*, 313 U.S. at 108-09.

176. *Id.* at 108 (emphasis added).

177. *Id.*

Furthermore, quoting from the language of an earlier decision discussing federal question jurisdiction, the Court continued: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."¹⁷⁸ Although this language probably was intended merely as a restatement of the general principle that federal courts, as courts of limited jurisdiction, should proceed cautiously when interpreting their own jurisdiction,¹⁷⁹ later courts would cite *Shamrock Oil* for the proposition that removal directly threatens the federal system of government created by the Constitution.¹⁸⁰

Consequently, *Shamrock Oil* established three separate grounds for limiting removal: (1) congressional intent gleaned from the 1887 amendment to restore removal practice to its former limits under the Judiciary Act of 1789;¹⁸¹ (2) congressional measures post-1887 on matters other than removal suggested that Congress favored a curtailment of federal jurisdiction;¹⁸² and (3) removal jurisdiction, like all federal jurisdiction, should be construed narrowly to protect the dignity of state courts.¹⁸³ Notably, the Court neither discussed the relative importance of these various factors nor provided a framework for dealing with cases in which different policies might suggest alternative results. For example, in interpreting an ambiguous removal statute, would federalism and respect for a supposedly general congressional hostility toward federal jurisdiction require the remand of a case which, under the Judiciary Act of 1789, could have been removed to the federal courts? Is it permissible or desirable for federal courts to tilt the litigation playing field in favor of plaintiffs for the ostensible purpose of preserving the dignity of state courts?

As far as most federal courts were concerned, the answers to such questions were clear. In subsequent years, federal courts (after dutifully referencing federalism and the alleged congressional hostility toward all federal jurisdiction) cited *Shamrock Oil* for the proposition that a plaintiff's right to select a forum is more important than a defendant's

178. *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263 (1934)).

179. *See* *Turner v. Bank of N. Am.*, 4 U.S. 8 (1799) (noting the general presumption against exercise of federal jurisdiction).

180. *See, e.g., Maloan v. BancorpSouth Bank, Inc.*, No. 01-1366, 2002 WL 1397266, at *3 (W.D. Tenn. Mar. 29, 2002) (*Shamrock Oil* restricts removal "to protect the state courts from usurpation by federal courts").

181. *Shamrock Oil*, 313 U.S. at 106-07 n.2.

182. *Id.* at 108-09.

183. *Id.* at 109.

right to removal.¹⁸⁴ Courts have also cited *Shamrock Oil* for the proposition that all doubts must be resolved in favor of remand.¹⁸⁵

However, in reaching these conclusion, the courts ignored *Shamrock Oil's* suggestion that Congress intended for the removal practice to return to the position it occupied prior to the 1875 Reconstruction Amendments.¹⁸⁶ In years that followed, additional federal courts would lose sight of the fact that nothing in *Shamrock Oil* grants federal courts a license to construct their own obstacles to removal. Nevertheless, from this point forward, removal would face scrutiny far more stringent than at any previous time.¹⁸⁷ Justice Story's notion that removal was intended to give defendants equal access to the federal courts quietly disappeared.¹⁸⁸ At the same time, removal became further restricted as new judicially-created obstacles appeared.¹⁸⁹

F. *The 1948 Judicial Code and Subsequent Amendments*

Although the treatment of removal by the courts changed during the twentieth century, Congress gave little indication that it either desired or authorized a fundamental transformation of removal practice. To the contrary, legislative action during the twentieth century simply evidences a consistent congressional desire to make removal practice fair and efficient. This is evidenced by amendments to the removal statutes enacted in 1948, 1949, 1965, and 1988.¹⁹⁰

The modern statutory basis for federal removal procedure emerged from the Judicial Code of 1948.¹⁹¹ Perhaps the most noteworthy point

184. See, e.g., *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (citing *Shamrock Oil* for the proposition that "[t]he plaintiff's right to choose his forum is superior to the defendant's right of removal"); see also *In re World Trade Center Disaster Site Litig.*, 270 F. Supp. 2d 357, 366 (S.D.N.Y. 2003) (citing *Shamrock Oil* as requiring strict construction to promote "the right of plaintiffs to choose the forum in which to bring suit"); *Harris Corp. v. Kollsman, Inc.*, 97 F. Supp. 2d 1148, 1150 (M.D. Fla. 2000) (finding that *Shamrock Oil* orders strict construction of removal statutes to uphold "a plaintiff's right to choose its own forum").

185. See, e.g., *Shadie v. Aventis Pasteur, Inc.*, 254 F. Supp. 2d 509, 514 (M.D. Pa. 2003); *Alessi v. Beracha*, 244 F. Supp. 2d 354, 356 (D. Del. 2003); *Curtin v. Port Auth. of N.Y. & N.J.*, 183 F. Supp. 2d 664, 667 (S.D.N.Y. 2002); *Vartanian v. Terzian*, 960 F. Supp. 58, 61 (D.N.J. 1997); *Univ. of Tenn. v. U.S. Fidelity & Guar.*, 670 F. Supp. 1379, 1387 (E.D. Tenn. 1987); *Mountain Navigation Co., Inc. v. Seafarers' Int'l Union of N. Am.*, 348 F. Supp. 1298, 1300 (W.D. Wis. 1971); *Jerro v. Home Lines, Inc.*, 377 F. Supp. 670, 671 (S.D.N.Y. 1974).

186. *Shamrock Oil*, 313 U.S. at 107.

187. See *infra* notes 230-32 and accompanying text.

188. See *supra* notes 75-77 and accompanying text.

189. See, e.g., *infra* notes 233-37 and accompanying text.

190. See *infra* footnotes 191-209 and accompanying text.

191. Act of June 25, 1948, ch. 89, § 1441, 62 Stat. 937.

about that statutory amendment concerns the timing of removal. Before 1948, a defendant could remove at any time prior to the due date of his responsive pleading.¹⁹² No uniform removal time period existed because the date for filing a responsive pleading varied from one jurisdiction to another. Accordingly, Congress enacted language that required service “within twenty days after commencement of the action or service of process, whichever is later.”¹⁹³ Congress intended that this measure would provide a uniform removal standard.¹⁹⁴

After the enactment of the 1948 Judicial Code, it became necessary to make a technical amendment to section 28.¹⁹⁵ At that time, New York and a handful of other states allowed an action to commence upon the service of a summons unaccompanied by a complaint, meaning that the removal period could run prior to the defendant’s receipt of the complaint.¹⁹⁶ Therefore, the statute was amended to provide that a defendant’s removal right was triggered by the receipt, “through service or otherwise, of a copy of the initial pleading.”¹⁹⁷ This amendment merely demonstrates Congress’s desire to ensure that removal procedures remained uniform and fair.

This sentiment is further demonstrated by a 1965 amendment in which Congress extended the time for removal from twenty to thirty days.¹⁹⁸ The Committee Report accompanying the House Bill stated that “the existing 20-day period for filing a petition for the removal of a civil action from a State court to a federal court is too short to permit the removal of many actions as to which valid grounds of removal exist.”¹⁹⁹ The legislative history also cited concerns about situations where a delay occurs due to a difficulty in obtaining local counsel.²⁰⁰ In short, Congress was concerned that the twenty-day limit made it “impractical to remove many cases over which federal jurisdiction could be exercised.”²⁰¹

A significant statutory amendment concerning removal occurred in 1988.²⁰² At that time, Congress amended the removal statute to allow for

192. 28 U.S.C. § 72 (1940) (consolidated in 28 U.S.C. § 1446).

193. Act of June 25, 1948, ch. 89, § 1446, 62 Stat. 939.

194. See Committee Note to 1948 Enactment of Removal Statutes, H.R. REP. NO. 80-308 at A135 (1948) (stating that revised section 1446 “will give adequate time and operate uniformly throughout the Federal jurisdiction”).

195. *Id.*

196. See Committee Note to 1949 Amendments to Sections 1446, 1447, and 1449, H.R. REP. NO. 80-352, § 83 (1949).

197. Act of May 24, 1949, ch. 139, § 83(b), 63 Stat. 101.

198. Act of Sept. 29, 1965, Pub. L. No. 89-215, 79 Stat. 887 (1965).

199. See 16 MOORE’S FEDERAL PRACTICE, *supra* note 139, at § 107App. 05[2].

200. *Id.*

201. See *id.*

202. Pub. L. No. 100-702 § 1016, 102 Stat. 4669 (1988).

disregarding the citizenship of fictitious defendants for removal purposes, to simplify the pleading requirements for removal, and to limit removal in a diversity action to one year from the filing of the complaint.²⁰³ Evidently the legislative history reflects a general congressional intent to ensure that removal practice remained fair and efficient.²⁰⁴ For example, the Committee Note suggests that disregarding fictitious defendants for removal purposes would eliminate potential problems, such as “great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removeability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove.”²⁰⁵ Although the 1988 amendment also imposed a one-year time limit on the removal of diversity actions,²⁰⁶ this “modest curtailment” of removal jurisdiction was directed to a discrete problem: situations in which a non-diverse defendant would attempt to remove on the eve of trial and create significant disruption.²⁰⁷ Congress simply was concerned with the unfairness and inefficiency of last minute forum shopping.²⁰⁸

It should be clear from these examples that statutory amendments to the removal statutes after the Second World War reflect a continuing congressional desire for removal practice to remain fair, uniform, and efficient.²⁰⁹ There is no evidence that Congress intended to restrict opportunities for removal by creating procedural landmines that would favor plaintiffs at the expense of defendants.

III. THE REMOVAL LANDSCAPE TODAY

A. *The Statute*

The statutory provisions governing removal are found in Title 28 of the United States Code at Sections 1441 through 1452.²¹⁰ They appear deceptively simple. First, Section 1441 provides the general jurisdictional grounds for removing cases involving either a federal question or

203. *Id.* § 1016.

204. *See infra* Part II.F.

205. 16 MOORE’S FEDERAL PRACTICE, *supra* note 139, at § 107 App. 05[2]. Congress’s intent for removal to remain fair and efficient also is demonstrated by the fact that a “detailed pleading” for grounds of removal was not required. Additionally, Congress viewed the requirement of bond for removal as an unnecessary “procedural complication.” *Id.*

206. *See* Act of Nov. 19, 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4669.

207. *See* 16 MOORE’S FEDERAL PRACTICE, *supra* note 139, at § 107 App. 05[2].

208. *Id.*

209. *See infra* Part II.F.

210. 28 U.S.C. §§ 1441-1452 (2000).

diversity of citizenship.²¹¹ Section 1441 allows for removal on grounds of diversity jurisdiction only by a non-resident defendant.²¹² Additional statutory provisions authorize removal for specific categories of cases. These categories include actions against federal officers or agencies,²¹³ suits against members of the armed forces,²¹⁴ civil rights cases,²¹⁵ and foreclosure actions against the United States.²¹⁶

The procedures governing removal jurisdiction are set forth in Sections 1446 through 1448.²¹⁷ The defendant must file a removal notice stating grounds for removal and attaching relevant pleadings and other documents from the state court action.²¹⁸ The complete notice must be filed within thirty days of receipt of the summons and complaint.²¹⁹ The statute also provides that where a basis for removal is not apparent in the initial pleading, but subsequently emerges, the defendant may remove within thirty days after receipt of an amended pleading “or other paper from which it may first be ascertained that the case is one which is or has become removable”²²⁰ Nevertheless, as a result of the previously discussed 1988 amendment, all cases predicated on diversity jurisdiction must be removed within one year of the commencement of the action.²²¹

The statutes also cover such procedural matters as service of process, joinder of parties, compiling the record, and moving for remand.²²² For example, the statute expressly provides that an order remanding a case to state court “is not reviewable on appeal or otherwise.”²²³ Additional requirements governing removal procedure also are found in the Federal Rules of Civil Procedure²²⁴ and in the local rules of many federal district courts.²²⁵

211. See § 1441(a) (removing cases “of which the district courts of the United States have original jurisdiction”).

212. *Id.* § 1441(b).

213. *Id.* § 1442.

214. *Id.* § 1442(a).

215. *Id.* § 1443.

216. *Id.* § 1444.

217. *Id.* §§ 1446-48.

218. *Id.* § 1446.

219. *Id.* § 1446(b).

220. *Id.*

221. *Id.*

222. See *id.* §§ 1447-49.

223. *Id.* § 1447(d).

224. See FED. R. CIV. P. 81(c) (governing such matters as the filing of an answer and the demand for a jury trial in a removed action).

225. See, e.g., MD. U.S.D.C. 103.5 (D. Md.) (requiring the filing of an additional certification for removed cases); U.S.D.C. D. DEL. L.R. 81.2 (D. Del.) (same); cf. *Hayes v. Bass Pro Outdoor World, L.L.C.*, No. 0269106, 2003 WL 187411 (N.D. Ill. Jan. 21, 2003) (remanding for failure to comply with local rule).

B. Current Judicial Attitudes Toward Removal

An understanding of current removal practice requires a review not only of the statute, but also of the caselaw. Indeed, a practitioner who advises his client about removal issues solely based upon the language of the statute should put his malpractice carrier on notice. Despite congressional desire for removal procedure to be uniform and fair, removal law varies widely by circuit,²²⁶ by district within each circuit,²²⁷ and, in some cases, by each judge within a particular district.²²⁸ The result is a procedural morass where even a careful litigator may unknowingly step into a trap that prevents removal of a case that otherwise falls within the reach of federal jurisdiction.

Although they disagree on many questions of removal practice, most federal courts agree about the overall philosophy that applies to removal: a defendant's right to remove must be limited wherever and whenever possible.²²⁹ Therefore, rarely does a decision concerning removal not begin with some variation of the axiom dictating strict construction of removal jurisdiction. This general rule also has led to several subsidiary maxims that detail the burdens placed upon the removing defendant. To begin, the removing defendant, as the party seeking to invoke the authority of the federal court, bears the burden of establishing the existence of federal jurisdiction.²³⁰ The removing defendant also must bear the additional burden of proving that he has complied with all removal procedures.²³¹ Most importantly, if there is any question over the existence of federal jurisdiction or over compliance with removal

226. See, e.g., *infra* notes 334-45 and accompanying text (discussing the split among the courts over the first-served defendant rule).

227. Compare *Green Point Savings Bank v. Hidalgo*, 910 F. Supp. 89, 92 (E.D.N.Y. 1995) (stating that the one-year limitation in 28 U.S.C. § 1446 is jurisdictional) with *In re Rezulin Prod. Liab. Litig.*, No. 00 Civ. 2843, 02 Civ. 6827, 2003 WL 21355201 at *3 (S.D.N.Y. June 4, 2003) (stating that the one-year bar is subject to equitable exceptions); *Freeman v. Bechtel*, 936 F. Supp. 320, 326 (M.D.N.C. 1996) (stating that later-served defendants may initiate removal even if earlier-served defendants failed to timely remove); *Beasley v. Goodyear Tire & Rubber Co.*, 835 F. Supp. 269 (D.S.C. 1993) (adopting opposite rule).

228. See, e.g., *Buchanan v. Lott*, 255 F. Supp. 2d 326 (D.N.J. 2003) (discussing the split among judges in the District of New Jersey over calculation of amount in controversy for purposes of removal).

229. See *supra* notes 184-85 and accompanying text.

230. *Wilson v. Republic Iron & Steel Co.* 257 U.S. 92 (1921); *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999); *Mulcahey v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981).

231. See, e.g., *Burns v. Windsor Ins. Co.* 31 F.3d 1092, 1094-95 (11th Cir. 1994); *Parker v. Brown*, 570 F. Supp. 640, 642 (S.D. Ohio 1983).

procedure, the court will resolve that question by remanding the case back to state court.²³²

Federal courts often base these presumptions upon the notion that a plaintiff's right to choose a forum is somehow superior to a defendant's removal right.²³³ Thus, as one frequently quoted case has stated: "Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing."²³⁴ Most federal courts²³⁵ start with the presumption of remand for all removed cases,²³⁶ and many courts have expressly rejected the notion that a defendant has an equal right to a federal forum.²³⁷ Contradicting earlier decisions and ignoring the legislative record, many federal courts also imply that removal rights do not derive in any way from the Constitution.²³⁸

232. See, e.g., *Mulcahey*, 29 F.3d at 151; *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993). Cf. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (finding that statutory procedures for removal are to be strictly construed); *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) ("there is a presumption against removal . . .").

233. See, e.g., *infra* notes 234, 237 and accompanying text.

234. *Burns*, 31 F.3d at 1095.

235. Fortunately, there are a minority of decisions that reject the notion that federal courts are intended primarily for the benefit of plaintiffs. See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 927 (4th Cir. 1992) (rejecting the suggestion that removal is "inherently bad" and finding that "defendant's right to remove a case that could be heard in federal court is at least as important as the plaintiff's right to the forum of his choice"); *Garland v. Humble Oil & Ref. Co.*, 306 F. Supp. 608, 610 (E.D. Tenn. 1969) ("While the plaintiff had a right to choose initially the state court as the forum for this action, the defendant has a subsequent equal right to resort herein to the federal court by complying with the removal statute . . ."); *Gentle v. Lamb-Weston, Inc.*, 302 F. Supp. 166-67 (D. Me. 1969) (refusing to allow fraudulent devices to "the substantial frustration of defendant's constitutional and statutory [removal] rights"); *Bradley v. Halliburton Oil Well Cementing Co.*, 100 F. Supp. 913, 916 (E.D. Okla. 1951) (noting that caution should be applied in remanding because defendant has no means of obtaining review).

236. See, e.g., *City of Univ. City v. AT&T Wireless Servs., Inc.*, 229 F. Supp. 2d 927, 933 (E.D. Mo. 2002) ("there is a presumption in favor of remand"); *Coca-Cola Bottling of Emporia, Inc. v. South Beach Beverage Co., Inc.*, 198 F. Supp. 2d 1280, 1285 (D. Kan. 2002) (adopting reasonable certainty test for calculating the amount in controversy because of "the presumption against removal"); *Harris Corp. v. Kollsman, Inc.*, 97 F. Supp. 2d 1148, 1151 (M.D. Fla. 2000) ("To scrupulously confine removal jurisdiction, federal courts have fashioned a presumption in favor of remand to state court.").

237. See, e.g., *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 219 n.11 (5th Cir. 1998) ("The defendant's right to remove and the plaintiff's right to choose the forum are not equal.") (internal citations omitted); *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) ("The plaintiff's right to choose his forum is superior to the defendant's right of removal.").

238. See, e.g., *Al-Cast Mold & Pattern, Inc. v. Perception, Inc.*, 52 F. Supp. 2d 1081, 1083 (D. Minn. 1999) (finding the removal right is "not one granted under the Constitution"); *Indep. Mach. v. Int'l Tray Pads & Packaging, Inc.*, 991 F. Supp. 687, 693 (D.N.J. 1998) (same); but see *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425

Stating that a plaintiff has a superior “right” to select a forum is merely an unsupported claim, not a self-evident fact.²³⁹ Additionally, the courts have not been articulate in explaining the source of this “right.”²⁴⁰ This right certainly does not emanate from the Constitution.²⁴¹ Nor is it derived from any statute of general application. Instead, courts that take the time to justify the plaintiff’s supposedly superior “right” typically rely upon policy reasons articulated over the last century.²⁴²

First, courts frequently cite federalism as grounds for restricting the defendant’s right to remove to federal court.²⁴³ Indeed, federalism and comity have been described as the “core rationale” behind the strict construction of removal statutes.²⁴⁴ At the same time, most courts do not explain precisely why it violates federalism when a federal court exercises constitutionally authorized federal jurisdiction, and why these courts simply proclaim that removal impinges on state sovereignty.²⁴⁵ Often, these conclusions accompany a citation to *Shamrock Oil*, in which the Court stressed that “[d]ue regard for the rightful independence of state governments” requires scrupulous enforcement of the “precise limits” of removal statutes.²⁴⁶

The second policy rationale underlying a plaintiff’s superior “right” involves a slight variation on the federalism theme.²⁴⁷ Courts cite the need to construe all federal jurisdictional statutes narrowly because federal courts are courts of limited, not general, jurisdiction.²⁴⁸ Often,

(E.D. Pa. 2002) (finding that the right of removal “emanates from Article III, Section 2 of the Constitution”).

239. See *supra* note 235 (illustrating that not all federal courts have held that plaintiff’s have a superior right).

240. See *infra* note 245 and accompanying text.

241. See *supra* note 238 and accompanying text.

242. See *infra* notes 244-56 and accompanying text.

243. See *infra* notes 244-46 and accompanying text.

244. *Dardeau v. West Orange-Grove Consol. Indep. Sch. Dist.*, 43 F. Supp. 2d 722, 730 (E.D. Tex. 1999). See also *Bristol-Meyers Squibb Co. v. Safety Nat’l Cas. Corp.*, 43 F. Supp. 2d 734, 741 (E.D. Tex. 1999); *Mulcahey v. Columbia Organic Chemical Co.*, 29 F. 3d 148, 151 (4th Cir. 1994).

245. See, e.g. *Mulcahey*, 29 F.3d at 151 (“Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction.”); *Bristol-Myers*, 43 F. Supp. 2d at 740 (removal strictly construed “to prevent encroachment on state courts’ jurisdiction and to preserve comity . . .”).

246. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); see also *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757 (6th Cir. 2000) (removal implicates federalism concerns); *Ferry v. Bekum Am. Corp.*, 185 F. Supp. 2d 1285, 1287 (M.D. Fla. 2002) (i.e. moral implicates federalism concerns).

247. See *infra* note 248.

248. *Bellone v. Roxbury Homes*, 748 F. Supp. 434, 436 (W.D. Va. 1990) (because federal courts have limited jurisdiction, they “should not be allowed to denigrate the requirements of the removal statutes to enhance their jurisdiction”); *Thompson v. Gillen*,

this argument joins with statements about federalism,²⁴⁹ although the two related concepts are, in some ways, distinct. Federal courts seeking to restrict removal again cite to *Shamrock Oil*,²⁵⁰ and in particular to the Supreme Court's statement that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."²⁵¹

Finally, federal courts also base the plaintiff's "right" upon the notion that fairness and efficiency require a strict construction of removal statutes.²⁵² Echoing *Kessinger* and *Fitzgerald*, these decisions assert that because a court without jurisdiction cannot render a valid judgment, efficiency would not allow a case to proceed to conclusion and produce a judgment of no value.²⁵³ Such a result, some courts have suggested, would violate "fundamental fairness" towards the plaintiff.²⁵⁴

It is these three policy concerns—federalism, the limited nature of federal jurisdiction, and efficiency/fairness—that ostensibly underlie the presumptions against removal and that serve to elevate the plaintiff's right to select a forum to a higher pedestal than defendant's removal right. In practice, courts typically rely on at least two of these factors to justify strict presumptions against removal.²⁵⁵ Lying beneath the three recognized grounds for presumptions against removal may exist unstated reasons for why modern federal courts favor remand. Judges, like all human beings, are subject to personal preferences, prejudices and pressures that unconsciously shape their decisions. For example, it is hardly a secret that many federal judges would welcome the curtailment of diversity jurisdiction.²⁵⁶ Additionally, a relatively widespread

491 F. Supp. 24, 26-27 (E.D. Va. 1980) (stressing that federal courts, as courts of limited jurisdiction, "must take care" not to exceed their jurisdiction when deciding removal questions).

249. See, e.g., *Thompson*, 491 F. Supp. at 26-27.

250. *Id.* at 26 (citing *Shamrock Oil*).

251. *Shamrock Oil*, 313 U.S. at 108.

252. See *infra* notes 253-54 and accompanying text.

253. See, e.g., *Thompson*, 491 F. Supp. at 26 ("[t]he prevailing judicial attitude rests on the inexpediency, if not unfairness, of exposing [the parties] to . . . a final judgment in federal court, only to have it determined that the court lacked jurisdiction on removal") (quoting 14 C. WRIGHT, A. MILLER, & E. COOPER, FED. PRAC. & PROC. § 3721 (1976)); *Radeschi v. Commonwealth of Pennsylvania*, 846 F. Supp. 416, 419 (W.D. Pa. 1993) (removal strictly construed because of the possibility of a "void" judgment).

254. See, e.g., *Bristol-Myers Squibb Co. v. Safety Nat'l Gas. Corp.*, 43 F. Supp. 2d 734, 741 (E.D. Tex. 1999).

255. *E.g.*, *Curtin v. Port Auth. of N.Y.*, 183 F. Supp 2d. 664, 667 (S.D.N.Y. 2002) (noting all three grounds); *Fenton v. Food Lion, Inc.*, No. Civ. A.3:02CV00017, 2002 WL 1969662 at *2 (W.D.Va. Aug. 23, 2002) (same).

256. See, e.g., Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism*, 78 VA. L. REV. 1671, 1671-73 (1992) (citing the Federal

perception exists that many federal judges consider removal inappropriate in cases involving diversity jurisdiction. It would be strange indeed if this judicial aversion to diversity jurisdiction did not lead to broader restrictions on the removal process. In fact, in several cases, courts have indicated that strict limitations upon the removal process serve as an indirect means of restricting diversity jurisdiction.²⁵⁷

In addition to a particular distaste for diversity jurisdiction, some decisions suggest that judicial hostility toward removal results more from a practical desire to relieve overburdened federal dockets than from lofty concerns regarding federalism or the institutional role of the courts.²⁵⁸ For example, in *Themton Products, Inc. v. Hermansdorfer*, the district court remanded a case because a less crowded docket would allow a plaintiff to proceed more quickly in state court.²⁵⁹ The U.S. Supreme Court reversed, noting that "an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason."²⁶⁰ The unspoken question, however, is whether other less candid decisions ordering remand have been influenced by the somewhat understandable desire of a federal judge to reduce his caseload by removing a case from his docket, particularly when his decision cannot be challenged on appeal.²⁶¹

Regardless of their true parentage, judicial presumptions against removal exert a powerful impact on litigation. For almost a century, federal courts have viewed all questions of removal practice through the prism of these presumptions.²⁶² The result of this longstanding practice

Courts Study Committee's agreement to recommend the limitation of diversity jurisdiction); Judicial Conference of the U.S., Long Range Plan for the Fed. Courts, 166 F.R.D. 49, 89-92 (1996) (proposing curtailment of diversity jurisdiction).

257. See, e.g., *Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1145 (8th Cir. 1992) (finding that "diversity jurisdiction in removal cases [is] narrower than if the case were originally filed in federal court by the plaintiff"); *Zumas v. Owens-Corning Fiberglas Corp.*, 907 F. Supp. 131, 134 (D. Md. 1995) (noting that the policy of comity in diversity cases favor remand); *Harris v. Huffco Petroleum Corp.*, 633 F. Supp. 250, 253 (S.D. Al. 1986) (determining that in diversity cases removal statutes must be strictly construed); *Thompson*, 491 F. Supp. at 26-27 (discussing heightened concerns regarding removal of diversity cases).

258. See, e.g., Judicial Conference, *supra* note 256, at 90 (suggesting that "the federal diversity docket constitutes a massive diversion of federal judge power away from their principal function" of adjudicating).

259. *Themtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 344 (1976).

260. *Id.* at 344.

261. 28 U.S.C. § 1447(d) (2001) (indicating that "[a]n order remanding a case to the court from which it was removed is not reviewable *on appeal or otherwise*") (emphasis added).

262. *Sloviter*, *supra* note 256, at 1682.

has been the creation of numerous barriers to removal that essentially vest plaintiffs with a greater right than defendants to litigate in a federal forum.

IV. A SAMPLING OF REMOVAL BARRIERS

Removal applies to claims that originally could have been brought in federal court.²⁶³ Accordingly, removal jurisdiction has been described as “coextensive with diversity and federal question jurisdiction.”²⁶⁴ “Co-extensive,” however, is not the same as “co-equal.” In fact, defendants seeking to remove a case to federal court face a number of unique obstacles not encountered by a plaintiff filing an original complaint in federal court.²⁶⁵ Some technical and procedural obstacles to removal are derived directly from the language of the statute. For example, § 1441 prohibits a resident defendant from removing on the basis of diversity jurisdiction.²⁶⁶ Additionally, § 1446 imposes a one-year bar on the removal of claims based on diversity jurisdiction.²⁶⁷

Additional impediments, not necessarily apparent from the statutory text, have been created as a result of the application of judicial presumptions against removal. This section considers four separate areas where judicial presumptions favoring remand have helped create artificial barriers to removal: (1) a refusal to apply traditional equitable exceptions to the one-year limit on removing diversity cases; (2) the requirement of unanimity among removing defendants and the timing implications of that requirement; (3) unnecessarily strict application of the well-pleaded complaint rule in diversity actions; and (4) manipulation of the amount in controversy by plaintiffs.²⁶⁸ First, however, this section discusses one case where the Supreme Court has curtailed procedural gamesmanship by eliminating a barrier to removal.

263. 28 U.S.C. § 1441.

264. 16 MOORE'S FEDERAL PRACTICE, *supra* note 139, § 107.04.

265. See, e.g., *id.* § 107.14[3][a][iii] (indicating that “if a plaintiff’s well pleaded complaint filed in state court does not allege any federal question, the defendant ordinarily may not remove the case to federal court, even if his or her defense or counterclaim is based on federal law”).

266. 28 U.S.C. § 1441(b).

267. *Id.* § 1446(b).

268. See generally Note, *Devices to Avoid Diversity Jurisdiction*, 44 HARV. L. REV. 97 (1931); Practice: *Federal Jurisdiction: Uniformity: Preventing Removal of Causes by Foregoing Part of Claim*, 15 CORNELL L.Q. 307 (1930) (containing an early discussion of devices used to defeat removal).

A. Timing Issues: Murphy Brothers²⁶⁹

Perhaps the most notorious removal landmine arose from the 1948 statutory amendment that required a defendant to file his removal notice within thirty days of receipt of a complaint by service "or otherwise."²⁷⁰ For forty years, federal courts disagreed over the interpretation of the amendment's language. Some courts held that the statutory removal period did not begin to run until a defendant had been served with both process and the complaint.²⁷¹ Other courts disagreed, holding that the "or otherwise" language of the statute required the removal clock to begin ticking as soon as the defendant received a copy of the complaint, regardless of the complaint's method of delivery.²⁷² Although courts adopting this latter construction were cognizant of the opportunities for manipulation their rulings provided, the courts relied upon judicial presumptions against removal and the policies underlying those presumptions, yet again, to support their decisions.²⁷³ Often, they included a *Shamrock Oil* citation in their analyses.²⁷⁴

While the courts debated the proper interpretation of the statutory language, the plaintiffs' bar developed mechanisms to defeat a defendant's removal right. For example, plaintiffs would file a complaint and then, without effecting service, send a courtesy copy of the complaint to the defendant or his counsel, along with a demand letter, but without a

269. For pre-*Murphy Bros.* discussion of these issues, see Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 MD. L. REV. 374, 379-83 (1993); Danna Rohwer, Comment, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(b)*, 61 UMKC L. REV. 359 (1992); Derek S. Hollingsworth, Comment, *Section 1446: Remediating the Fifth Circuit's Removal Trap*, 49 BAYLOR L. REV. 157, 160-62 (1997). For scholarly comment written after *Murphy Brothers*, see C. Todd Hagins, *Sands in an Hourglass: Solving the Puzzle of Time Limits for Removal to Federal Court*, 68 DEF. COUNS. J. 421 (2001); Barbara A. Wiseman, *Applying Murphy Bros. v. Michetti Pipe Stringing, Inc. to Removal in Multiple-Defendant Lawsuits*, LOY. L.A. L. REV. 323 (2000).

270. § 1446(b).

271. See, e.g., *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 333 (D.S.C. 1996); *Baratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333, 337 (W.D.N.Y. 1992); *Love v. State Farm Mut. Auto. Ins. Co.*, 542 F. Supp. 65 (N.D. Ga. 1982).

272. See, e.g., *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 843-44 (5th Cir. 1996); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994); *Trepel v. Kohn, Milstein, Cohen & Hausfeld*, 789 F. Supp. 881, 883 (E.D. Mich. 1992); *Dawson v. Orkin Exterminating Co., Inc.*, 736 F. Supp. 1049, 1053 (D.Colo. 1990); *Tyler v. Prudential Ins. Co. of Am.*, 524 F. Supp. 1211, 1213 (W.D.Pa. 1981).

273. See, e.g., *Reece*, 98 F.3d at 842 ("We recognize that the receipt rule is subject to abuse.").

274. See, e.g., *Roe*, 38 F.3d at 304; *Trepel*, 789 F. Supp. at 883; *Dawson*, 736 F. Supp. at 1053.

summons.²⁷⁵ Alternatively, a plaintiff might provide a copy of the complaint to a low-level employee or agent who could not be expected to quickly get it to corporate counsel.²⁷⁶ In either case, the defendant may be lulled into letting the thirty day statutory removal period lapse, a period which applied in circuits governed by the so-called “receipt rule.”

Fortunately, this problem was largely resolved by the decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, in which the Supreme Court rejected the receipt rule, holding that the statutory time period for removal does not begin to run until both service of the complaint and service of process have been effected.²⁷⁷ In *Murphy Brothers*, the plaintiff filed a complaint in Alabama state court for breach of contract and fraud.²⁷⁸ Three days after filing, plaintiff sent the defendant a courtesy copy of the complaint.²⁷⁹ Only after settlement negotiations ceased did the plaintiff effect formal service of process.²⁸⁰ The defendant then removed the case to federal district court within thirty days of formal service of the complaint, but more than thirty days after the defendant received the courtesy copy.²⁸¹ The district court rejected plaintiff’s motion for removal and plaintiff appealed to the Eleventh Circuit.²⁸²

The Eleventh Circuit Court of Appeals viewed the statutory language as unambiguous, holding that the removal clock began to run when the defendant received a copy of the complaint, regardless of when, or even if, formal service of process occurred.²⁸³ The Supreme Court granted certiorari and reversed, holding that the removal time period cannot be triggered until the defendant receives formal service of process.²⁸⁴ This conclusion naturally flowed from the “bedrock principle” that a defendant need not participate in litigation until a court exercises jurisdiction through formal service of process.²⁸⁵

Additionally, apart from the historical requirement of service of process, the Court found that the text of the removal statute indicated that the removal clock should not begin to run until service of process is

275. See, e.g., *White v. White*, 32 F. Supp. 2d 890, 891 (W.D. La. 1998); *Love*, 542 F. Supp. at 67.

276. See, e.g., *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 966 (6th Cir. 1993).

277. 526 U.S. 344, 347-48 (1999).

278. *Id.* at 348.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 349.

283. *Id.*

284. *Id.* at 356.

285. *Id.* at 347.

effected.²⁸⁶ The Court traced the history of the removal statute and noted that, “[p]rior to 1948, a defendant could remove a case any time before the expiration of her time to respond to the complaint under state law.”²⁸⁷ The Court then noted that the 1948 Judicial Code enacted a uniform time period that, was intended to “give adequate time and operate uniformly throughout the Federal jurisdiction.”²⁸⁸ The revision adopted in 1949, which added the “service or otherwise” language, was not intended to achieve a different result.²⁸⁹ Accordingly, the Court construed the statute in a commonsense manner that “adheres to tradition, makes sense of the phrase ‘or otherwise,’ and assures defendants adequate time to decide whether to remove an action to federal court.”²⁹⁰ Essentially, in construing the statute, the Court assumed that Congress intended a fair and balanced removal practice.²⁹¹

In a short dissent, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) noted that the majority decision in *Murphy Brothers* departs from the practice of strictly construing removal statutes.²⁹² At the same time, the dissent did not suggest that in adopting an amendment designed to make removal procedure more fair and uniform, Congress intended to create procedural obstacles to removal that could be exploited by plaintiffs and their attorneys. Instead, the dissent simply cited to *Shamrock Oil* as support for the strict construction principle.²⁹³

Although the Court’s opinion in *Murphy Brothers* left a number of questions unanswered,²⁹⁴ it significantly clarified removal practice and reduced the opportunities for gamesmanship. The decision also demonstrated that federal courts need not allow self-created

286. *Id.* at 351-54.

287. *Id.* at 351.

288. *Id.* (quoting H.R. Rep. No. 308, 80th Cong., 1st Sess., A135 (1947)).

289. *Id.* at 351-53.

290. *Id.* at 354.

291. *Id.* at 356. Notably, the majority opinion contains no citation to *Shamrock Oil* and nowhere recites the mantra of lower federal courts that all doubts should be resolved in favor of a remand.

292. *Id.* at 357 (Rehnquist, J., dissenting).

293. *Id.*

294. For example, the decision does not address when the thirty-day period begins to run if the plaintiff serves a statutory agent rather than the defendant himself. Compare *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237 (D. Kan. 2002) (stating that service on an agent commences removal period), with *Monterey Mushrooms, Inc. v. Hall*, 14 F. Supp. 2d 988, 990-91 (S.D. Tex. 1998) (declaring that removal does not commence until the defendant receives papers). Further, *Murphy Bros.* does not address timing issues that arise in cases involving multiple defendants. See, e.g., Matthew J. Mussalli, *Tick, Tock: Rules on the Removal Clock*, 19 Rev. Litig. 47, 54-59 (2000) (concluding that, as evidenced through subsequent decisions, *Murphy Bros.* does not address the issue of service on multiple defendants).

presumptions to spawn artificial barriers to removal.²⁹⁵ This case reveals how federal courts, after unshackling themselves from their self-imposed presumptions, can achieve results that are both sensible and consistent with the underlying purpose of removal. Although this case was a step in the right direction, there remain many other areas of removal practice that need a comparable overhaul.

B. Use of Token Defendants to Prevent Removal

In the post-*Murphy Brothers* world, perhaps the most common vehicle for procedural manipulation of removal statutes involves the use of token nondiverse defendants to defeat removal. This manipulation is fostered under 28 U.S.C. § 1446(b), a statute which allows a defendant thirty days to remove an initially unremovable case that later becomes removable, as a result of an “amended pleading, motion, order or other paper.”²⁹⁶ Section 1446(b) fosters manipulation because it also provides that a case may not be removed on the basis of diversity jurisdiction more than one year after commencement of the action.²⁹⁷ This limitation, imposed by a 1988 amendment, applies even where the basis for federal jurisdiction does not appear in the initial complaint.²⁹⁸ Thus, by disguising the existence of federal jurisdiction for more than a year after the filing of the complaint, a plaintiff can cause the period for removal to expire before the defendant is capable of removing the action.

Plaintiffs take full advantage of this situation. As one guide to avoiding removal candidly advises plaintiffs’ attorneys: “if the plaintiff can ethically do so, an attempt should be made to destroy diversity by naming at least one resident defendant.”²⁹⁹ In fact, it is not unusual for a plaintiff to name as a defendant a party from whom the plaintiff has no intention of seeking any recovery.³⁰⁰ Furthermore, unless it can be said

295. Cf. *Ariel Land Owners, Inc. v. Dring*, 245 F. Supp. 2d 589, 594-95 (M.D.Pa. 2003) (“I take *Murphy Bros.* to indicate that the Justices have chosen not [to] follow a statute’s supposed ‘plain meaning’ without first carefully considering purpose and policy.”).

296. 28 U.S.C. § 1446(b) (2000). For example, a defendant may remove a case when an amended complaint alleges a federal claim in a case previously including only state law claims. Or, if a complaint for a modest amount of damages is amended to request damages in excess of \$75,000, diversity jurisdiction may exist over a claim that previously was unremovable.

297. *Id.* § 1446(b).

298. See *supra* notes 201-05 and accompanying text (discussing the 1988 statutory amendment).

299. Allyson Singer Breeden, *Federal Removal Jurisdiction and Its Effect on Plaintiff Win-Rates*, 46 RES GESTAE 26, 30 (2002). See also *id.* at 31 (advising plaintiffs to be “wary” of admitting that the statutory minimum for diversity jurisdiction is exceeded).

300. See, e.g., Mem. of Law in Opposition to Plaintiff’s Remand Mot., *Gibbs v. Black & Decker (U.S.) Inc.*, No. 03 Civ. 0860 (S.D.N.Y. 2003) (on file with author) (describing removal of an action in which plaintiff named her own grandmother as an additional

with complete certainty that no claim could possibly be brought against such a defendant under state law, the courts will often treat these bogus parties as if they are real.³⁰¹ Accordingly, a plaintiff can easily defeat removal by finding a friendly, impecunious, or disinterested non-diverse defendant and then waiting until after the one-year expiration before dismissing that defendant.³⁰²

Another common tactic is to delay an amendment of the amount in controversy until after the one-year limit has passed. In one case, for example, a plaintiff pled damages of \$49,999 (i.e., \$0.01 below the statutory threshold for diversity jurisdiction at that time), waited until passage of the one-year bar, and then amended the complaint to increase the *ad damnum* to \$150,000 and to seek punitive damages.³⁰³ By this maneuver, the plaintiff successfully prevented removal of the case. The district court acknowledged that its decision “has the effect of permitting a plaintiff to lie in wait with his or her amended complaint containing an increased *ad damnum*, and thereby to keep diversity litigation in a State Court.”³⁰⁴ Nevertheless, the court felt constrained to strictly apply the one-year limit on removal.³⁰⁵

It would seem that an obvious response to gamesmanship of the kind described in the two preceding examples would be to allow defendants to remove after one-year where the plaintiff has inequitably engaged in procedural maneuvering. After all, federal courts long have prevented tactical manipulation of procedural rules that achieve unfair results; statutes of limitation, for example, are often “tolled” for equitable

defendant in a products liability action against a manufacturer). The author participated as counsel for the manufacturer in opposing the subsequent remand motion.

301. See, e.g., *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) (explaining that a defendant must show no possibility of a claim in order to establish fraudulent joinder). See also *Hartley v. CSX Transp., Inc.* 187 F.3d 422, 424 (4th Cir. 1999) (declaring that “[t]o show fraudulent joinder, the removing party must demonstrate . . . that ‘there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.’”).

302. See *Breeden*, *supra* note 299, at 31 (“If it becomes necessary to voluntarily dismiss a defendant that destroyed diversity, a carefully timed dismissal that occurs outside of the one-year time limit for removing diversity cases might thwart the defendant’s attempt to remove.”). See also *In re Rezulin Prods. Liab. Litig.*, No. 00Civ.2843, 02Civ.6827, 2003 WL 21355201 at *3 (S.D.N.Y. June 4, 2003) (discussing the non-suiting of a non-diverse defendant one year and five days after service of complaint); *Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1326 (N.D. Ohio 2003) (upholding the dismissal of a non-diverse defendant one year and six days after service).

303. *Cofer v. Horsehead Research & Dev. Co., Inc.*, 805 F. Supp. 541, 542 (E.D. Tenn. 1991).

304. *Id.* at 544.

305. *Id.* (suggesting that Congress, rather than the courts, amend the one-year limit).

reasons.³⁰⁶ The courts also consider equitable factors in deciding whether to grant an extension of the time for an appeal.³⁰⁷ In fact, the Fifth Circuit recently relied on precisely this logic in holding that equitable exceptions can be made to the one year-bar on removal of diversity actions.³⁰⁸ In so doing, the court noted that equitable tolling principles are common in civil litigation and that the time limits for removal are “merely modal and formal.”³⁰⁹ Accordingly, it allowed the tolling of the one-year deadline to prevent the plaintiff from employing procedural gamesmanship to defeat the defendant’s removal right.³¹⁰ The court explained, “strict application of the one-year limit would encourage plaintiffs to join non diverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction.”³¹¹ Moreover, even if Congress intended to limit diversity through the 1988 amendment, “it did not intend to allow plaintiffs to circumvent it altogether.”³¹²

Unfortunately, some federal courts have declined to follow *Tedford*³¹³ and pre-*Tedford* decisions suggest that many courts are less troubled by the use of procedural maneuvering.³¹⁴ Thus, while openly acknowledging that plaintiffs’ lawyers manipulate the statute to defeat a defendant’s removal right, many federal courts have concluded that they do not have the power to extend the one-year deadline, despite a plaintiff’s blatant tactics.³¹⁵ Instead, these courts hold that equitable principles have no

306. See, e.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that the filing of a Title VII claim is subject to “equitable tolling”); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434-35 (1965) (concluding that the limitations period in FELA actions is subject to equitable tolling); *C.M. English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (discussing the doctrine of equitable tolling).

307. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 394 (1993) (finding the “excusable neglect” standard for grant of extension is an equitable determination).

308. See *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003).

309. *Id.* at 426.

310. *Id.* at 427.

311. *Id.*

312. *Id.*

313. See, e.g., *Mantz v. St. Paul Fire & Marine Ins. Co.*, No. Civ.A.2:03-0506, 2003 WL 21383830, at *2 (S.D. W.Va. June 13, 2003) (rejecting *Tedford* and refusing to recognize equitable exceptions to one year bar).

314. See, e.g., *Martine v. Nat’l Tea Co.*, 841 F. Supp. 1421, 1422 (M.D. La. 1993) (ordering remand despite that “[b]y delaying service on [defendant] for over a year, plaintiffs ensured that this action could not be timely removed by [defendant] to a federal forum”); *Russaw v. Voyager Life Ins. Co.*, 921 F. Supp. 723, 725 (M.D. Ala. 1996) (concluding that if more than a year has passed even fraudulent joinder provides no ground for remand).

315. See, e.g., *Russaw*, 921 F. Supp. at 724 (stating that “[t]he court finds that Congress did not intend to except fraudulent joinder”); *Martine*, 841 F. Supp. at 1421 (ordering

application in cases involving removal. They therefore hold that the one-year period is jurisdictional and cannot be altered even where the plaintiff has resorted to gamesmanship.³¹⁶ This conclusion is usually reached immediately after rote pronouncements of the need to construe removal statutes strictly.³¹⁷ Essentially, courts have consciously allowed judicially created presumptions to impose a barrier to removal, which encourages tactical manipulation of procedural rules by plaintiffs.³¹⁸

C. Multiple Defendants and the Rule of Unanimity

Section 1446 of 28 U.S.C. provides for removal by "[the] defendant or the defendants" and requires the "defendant or defendants" to file the notice of removal.³¹⁹ Although alternative constructions of the statutory language seem plausible, courts long have required unanimity in removal.³²⁰ This means that a removal notice will be deemed defective if, for unexplained reasons, all defendants do not join in the removal petition or indicate their approval.³²¹ In other words, "[t]he rule of unanimity gives each defendant an absolute veto over removal."³²² The stated reason for this rule is that all defendants have an equal right to remain in state court.³²³

The rule of unanimity, which federal courts rigorously enforce, prevents a defendant from simply alleging that all defendants consent to removal.³²⁴ Although the requirement is not found in the text for the

remand despite "grave concerns about a plaintiff intentionally withholding service until the one year period for removal has run"); *Hom v. Serv. Merch. Co., Inc.*, 727 F. Supp. 1343, 1344-46 (N.D.Cal. 1990) (concluding that Section 1446(b) requires remand under the one-year-after-commencement rule even though process was served upon the defendants only thirty days before removal).

316. See, e.g., *Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1326, 1327 (N.D. Okla. 2003) (refusing to allow equitable exception despite plaintiff's use of a "classic example" of "tactical chicanery"); *Codner v. Am. Home Products Corp.*, 123 F. Supp. 2d 1272, 1274 (W.D. Okla. 2000).

317. See, e.g., *Caudill*, 271 F. Supp. 2d. at 1327 (citing *Shamrock Oil*); *Ariel Land Owners, Inc. v. Dring*, 245 F. Supp. 2d 589, 601 (M.D. Pa. 2003).

318. To complicate matters further, the courts also disagree over whether the one-year rule applies to all diversity cases or only to cases that are not initially removable. Compare *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998) (former view), with *Foiles v. Merrell Nat'l Labs.*, 730 F. Supp. 108, 110 (N.D. Ill. 1989) (latter view).

319. 28 U.S.C. § 1446(a)-(b) (2000).

320. See, e.g., *Beardsley v. Torrey*, 2 F. Cas. 1188, 1189 (D. Pa. 1822).

321. See, e.g., *Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817 (S.D. W.Va. 2002); see also *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 368 (7th Cir. 1993).

322. *Garside v. Osco Drug Co.*, 702 F. Supp. 19, 21 (D. Mass. 1988).

323. E.g., *Town of Fairfax v. Ashbrook*, 3 F. Supp. 345 (1933).

324. See, e.g., *Faulk v. Owens-Corning Fiberglas Corp.*, 48 F. Supp. 2d 653, 667-69 (E.D. Tex. 1999) (requiring all 185 defendants served by plaintiffs to join in the removal petition).

removal statutes,³²⁵ courts require each defendant to either execute a written consent to removal or be represented by the attorney who signs the removal papers.³²⁶ This judicially created requirement is once again justified by the usual arguments in favor of construing removal strictly.³²⁷ Where this inefficient procedural requirement is not met, federal courts will ignore the substantive question of whether all defendants intended to remove the case to federal court and instead simply order a remand.³²⁸

Consider *Erie Insurance Exchange v. Sunbeam-Oster, Inc.*, where the plaintiff sued a product manufacturer, the manufacturer's parent corporation, and various "doe defendants."³²⁹ Under Maryland law, the parent corporation was considered a nominal party, and under federal law, the fictitious doe defendants were disregarded for removal purposes.³³⁰ Accordingly, the product manufacturer, the only true defendant, removed the case to federal court.³³¹ In remanding the case, the district court held that although the doe defendants and the parent corporation appeared to be nominal parties who could be disregarded for purposes of removal, the failure to "account" for them in the removal notice rendered removal defective.³³² Thus, although the court assumed there was a substantive basis for the exercise of diversity jurisdiction, and although the only true defendant and all its corporate affiliates clearly consented to removal, "the requirement that courts strictly construe the removal statute," necessitated remand.³³³

325. *Cf. Still v. Debuono*, 927 F. Supp. 125, 129 (S.D.N.Y. 1996) (noting that the rule of unanimity is a judicially created rule).

326. *See Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817 (S.D. W.Va. 2002); *Fenton v. Food Lion Inc.*, No. Civ.A.3:02CV00017, 2002 WL 1969662, at *2-3 (W.D. Va. Aug. 23, 2002).

327. *See Fenton*, 2002 WL 1969662, at *2 (noting policy reasons for strictly construing removal right). *See also Dorsey*, 218 F. Supp. at 818 ("If federal jurisdiction is doubtful, remand is necessary.").

328. *See, e.g., Codapro Corp. v. Wilson*, 997 F. Supp. 322 (E. D.N.Y. 1998) (finding that a letter from co-defendants removing defendants was insufficient indication of consent to removal where it was not communicated directly to the court); *Diebel v. S.B. Trucking Co.*, 262 F. Supp. 2d 1319, 1329 (M.D. Fla. 2003) (remanding case where same counsel represented all defendants at time of remand motion, but not when removal notice was filed).

329. *Erie Ins. Exch. v. Sunbeam-Oster, Inc.*, No. AW-00-3723, slip op. (D. Md. Aug. 21, 2003). Members of the author's firm represented the defendants in this case.

330. *See id.* at 2.

331. *Id.* at 1-2.

332. *Id.* at 3-4.

333. *Id.* at 3; *see also N. Ill. Gas. Co. v. Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982) (citing *Wright v. Missouri Pac. R.R. Co.*, 98 F. 2d 34, 36 (8th Cir. 1938); *Heckleman v. Yellow Cab Transit Co.*, 45 F. Supp. 984, 985 (E.D. Ill. 1942); *Santa Clara County v. Goldy Machine Co.*, 159 F. 750, 750-51 (N.D. Cal. 1908) (stating that "a petition filed by

The decisions discussed above present a vivid contrast to nineteenth century removal decisions that refused to "let the nominal prevail over the actual . . . [or to] follow the letter rather than the spirit."³³⁴ The true opportunity for manipulation arises, however, when the rule of unanimity is combined with the statutory requirement that a defendant remove within thirty days of service.³³⁵ Some courts sensibly construe this rule as requiring all defendants to move or otherwise join in a removal petition within thirty days of service of process upon the last-served defendant.³³⁶ Other courts, relying on the doctrine that removal is strictly construed, hold that the removal clock runs from the time of service on the first-served defendant.³³⁷ A third group holds that a separate removal "clock" runs for each defendant based upon the date that defendant received service.³³⁸

In circuits applying either of the latter two constructions, a plaintiff enjoys ample room to manipulate the system.³³⁹ For example, a plaintiff suing multiple defendants may select the defendant least likely to remove the case, perhaps an individual defendant unlikely to retain counsel, and effect service upon that defendant.³⁴⁰ Subsequently, after thirty days pass and the removal period expires, the plaintiff will then, and only then, serve a corporate defendant with deep pockets who, if permitted, certainly would encourage all defendants to remove the case to federal court.³⁴¹ In circuits adopting either the first-served defendant rule or the multiple-trigger rule, removal may prove impossible in some situations because a later served defendant may lose his right to remove if an earlier-served defendant already waived his removal right.³⁴² Essentially,

less than all of the named defendants is considered defective if it fails to contain an explanation for the absence of co-defendants").

334. *San Antonio Suburban Irrigated Farms v. Shandy*, 29 F.2d 579, 581 (D. Kan. 1928).

335. *See* 28 U.S.C. § 1446(b) (2000).

336. *See, e.g., Brown v. Tokio Marine and Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002); *Marano Enter. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756-57 (8th Cir. 2001).

337. *See, e.g., N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 887 n.4 (5th Cir. 1998) (citing *Brown v. Demco, Inc.*, 792 F.2d 478, 481 & n.11 (5th Cir. 1986); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988)); *Varney v. Johns-Manville Corp.* 653 F. Supp. 839, 840 (N.D. Cal. 1987) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062 (9th Cir. 1979); *Godman v. Sears, Roebuck & Co.*, 588 F. Supp. 121 (E.D. Mich. 1984); *Schmidt v. Nat'l Org. for Women*, 562 F. Supp. 210 (N.D. Fla. 1983).

338. *See, e.g., McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992); *Holden v. City of Atlanta*, 925 F. Supp. 783, 785 (N.D. Ga. 1996).

339. *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1070 (E.D. Wis. 2001).

340. *Id.*

341. *Id.*

342. *Brown v. Demco, Inc.*, 792 F. 2d 478, 481-82 (5th Cir. 1986).

once an earlier-served defendant waives his removal right there can be no additional attempt.³⁴³ Thus, by carefully timing service of process upon different defendants, plaintiffs can effectively strip later-served defendants of their right to removal.³⁴⁴

Courts are well aware that they are creating opportunities for plaintiffs to defeat a defendant's removal right by adhering to either the first-served defendant rule or the multiple-trigger rule.³⁴⁵ Nevertheless, unfairness will not stand in the way of "faithful adherence" to the removal statutes.³⁴⁶ Instead, and once again, purported concerns for federalism and respect for a plaintiff's right to forum selection trump fairness, and foster an environment where procedural gamesmanship is tolerated, if not explicitly encouraged.

D. Application of the Well-pleaded Complaint Rule in Diversity Cases

A defendant seeking to exercise his removal right may face another removal obstacle that arises from the application of the "well-pleaded complaint" rule to the question of whether diversity exists between parties.³⁴⁷ Under the well-pleaded complaint doctrine, courts determine the existence of federal jurisdiction from the face of the plaintiff's properly pleaded complaint.³⁴⁸ For example, in determining whether a federal claim has been alleged, the courts will not go beyond the pleading to ascertain what the plaintiff could or should have pleaded; courts will look solely what has been pleaded.³⁴⁹ This rule makes perfect sense when the plaintiff initiates suit in federal court. After all, the plaintiff, as master of his claims, should bear the burden of properly pleading his right to be in federal court.³⁵⁰

Problems emerge, however, when the courts strictly apply the well-pleaded complaint rule to defendants attempting removal to federal court. Upon removal, the defendant bears the burden of proving federal jurisdiction.³⁵¹ In satisfying this burden, defendant faces the additional problem that the pleading upon which a court will base its jurisdictional determination was drafted by the defendant's opponent. Some plaintiffs' attorneys take deliberate advantage of this situation by drafting their

343. *Id.*

344. *Auchinleck*, 167 F. Supp. 2d at 1070.

345. *Id.* at 1069 (stating that "in the removal context, faithful adherence to the statutory language is more important than avoiding potential unfairness").

346. *Id.*

347. See 16 MOORE'S FEDERAL PRACTICE, *supra* note 139, § 107.14[3][a][iii].

348. *Id.*

349. See *id.*

350. See *id.*

351. See *supra* note 230 and accompanying text.

pleadings in a way that makes removal difficult, if not impossible. For example, a plaintiff may disguise a claim based on federal law as a state law claim.³⁵² This imposes upon a defendant the burden of proving that the case, although disguised as a state law claim, actually requires a determination of federal law.³⁵³

Even more troubling issues can arise in diversity cases. Consider the situation facing a defendant who seeks to remove a breach of contract action brought by a Virginia partnership against a Maryland resident in a Virginia court. For purposes of determining diversity jurisdiction, the citizenship of the plaintiff partnership is that of its constituent partners. The defendant's attorney may strongly suspect that the plaintiff partnership is comprised of two individuals who are citizens of Virginia. Nevertheless, if the plaintiff deliberately omits this information from the complaint, absent some other concrete evidence of citizenship, the defendant cannot remove the case.³⁵⁴ As a result, the defendant is relegated to state court until he can compel the plaintiff to produce an amended pleading or other "paper" identifying the residency of the individual partners.³⁵⁵

As has been demonstrated, plaintiff's failure to state his residency is yet another gamesmanship maneuver. As a result, defendant is forced to seek that information through the discovery process in the state court action.³⁵⁶ However, it is not unusual for a plaintiff to delay providing this material by refusing to provide such discovery answers on grounds of relevancy, thereby forcing defendant to obtain an order from the state court compelling production. If the plaintiff can delay disclosure until more than a year after the filing of the complaint, the case becomes

352. See 16 MOORE'S FEDERAL PRACTICE, *supra* note 139, at § 107.14[3][b][iv] (discussing the artful pleading doctrine and the removal of federal claims which purport to be state law claims).

353. See, e.g., *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 122 S. Ct. 1753 (2002); *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799 (4th Cir. 1996).

354. See, e.g., *Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 162 (4th Cir. 1997) (stating that the test for removal is objective and is based upon what the documents exchanged between the parties reveal); *Shank Land Co. LLC v. Ark. Land Co.*, 170 F. Supp. 2d 660, 661-62 (S.D. W.Va. 2001) (finding that where the initial pleading did not reveal the citizenship of the parties, the removal clock would not begin to run until receipt of the paper providing that information). Although a defendant may challenge the citizenship allegations in the complaint, he cannot affirmatively allege the citizenship of the parties upon information and belief.

355. See *Shank Land Co.*, 170 F. Supp. 2d at 661-62.

356. See, e.g., *id.*; *Lovern*, 121 F.3d at 161. See also *Kaneshiro v. N. Am. Co. for Life & Health*, 496 F. Supp. 452, 462 n.22 (D. Haw. 1980) (stating that as an alternative to interrogatories, a defendant may submit a request to admit in order to determine, the propriety of removal); *Scott v. S.F. Greiner*, 858 F. Supp. 607, 610 n.2 (S.D. W.Va. 1994) (indicating that if a defendant considers a plaintiff's allegations too vague for seeking removal, the party should seek more definite statement in state court).

statutorily unremovable.³⁵⁷ Moreover, if the defendant waits for concrete facts to support a removal petition, the court may conclude that defendant ignored obvious clues and waived his right to remove.³⁵⁸ Once again, judicially created presumptions against removal foster an environment in which procedural gamesmanship flourishes at the expense of a defendant's right to removal.

E. Manipulation of the Amount in Controversy

Another fertile ground for manipulation of removal involves the amount in controversy requirement for diversity jurisdiction. A defendant removing a case on the basis of diversity must establish that the amount in controversy exceeds \$75,000, "exclusive of interest and costs."³⁵⁹ Because the well-pleaded complaint rule applies to the determination of jurisdictional issues, however, the defendant typically is bound by a demand contained in the complaint.³⁶⁰

Plaintiffs, of course, are well aware that if they plead substantial damages in their initial complaint, a defendant may remove the case on grounds of diversity jurisdiction. Accordingly, plaintiffs may successfully defeat removal by deliberately understating damages in their initial complaint.³⁶¹ For example, in *Barber v. Albertsons*, the plaintiff initially filed a state court action alleging damages in excess of \$10,000.³⁶² The defendant then served a request for admission asking the plaintiff to admit or deny that the amount in controversy did not exceed the jurisdictional threshold for diversity jurisdiction.³⁶³ The plaintiff denied the request for admission.³⁶⁴ The plaintiff, therefore, "refused to admit that the amount in controversy does not exceed \$50,000.00 [the minimum amount required to trigger diversity jurisdiction]."³⁶⁵ Nevertheless, after remarking that a plaintiff's right to choose a forum is superior to a defendant's removal right, the court remanded the case on grounds that plaintiff's reply did not provide the underlying facts necessary to

357. See 28 U.S.C. § 1446(b) (2000). See also *supra* notes 219-21 and accompanying text.

358. See, e.g., *Kaneshiro*, 496 F. Supp. at 460 (stating that averment of residence in the complaint is a "clue" regarding citizenship that requires the defendant to remove within thirty days); see also *Kanter & Eisenberg v. Madison Assocs.*, 602 F. Supp. 798, 801 (N.D. Ill. 1985).

359. 28 U.S.C. § 1332 (2000).

360. See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 291 (1938).

361. See *infra* note 362 and accompanying text.

362. 935 F. Supp. 1188, 1188-89 (N.D. Okla. 1996).

363. *Id.* at 1191.

364. *Id.*

365. *Id.* at 1191.

establish jurisdiction.³⁶⁶ Adding insult to injury, the court suggested that a thorough factual analysis of the plaintiff's claims by the defendant could have established a basis for diversity jurisdiction.³⁶⁷ Once again, a Twentieth Century court rendered a removal decision that would have been unimaginable to nineteenth century courts that had refused to "follow the letter rather than the spirit."³⁶⁸

Defendants with a good faith belief that diversity jurisdiction exists in a given case, but who cannot substantiate that belief at the inception of a case, face a Hobson's choice. If the defendant removes, the district court may remand the case and perhaps assess fees and costs against him.³⁶⁹ Alternatively, if the defendant delays removal until such time when the plaintiff acknowledges the true amount in controversy or the citizenship of the parties, the defendant may find, through inaction, that he has waived his right of removal.³⁷⁰ Of course, once a year passes, the case becomes unremovable anyway.³⁷¹

A related problem arises when a defendant's counterclaim in state court satisfies the amount in controversy requirement, but the plaintiff's initial claim does not. In some circuits, a plaintiff filing in federal court may rely on both his own claim and the defendant's compulsory counterclaim to satisfy the amount in controversy requirement.³⁷² Many courts have concluded, however, that the same does not hold true when a defendant seeks to remove an action to federal court based, in whole or in part, on the amount placed in controversy by his counterclaim.³⁷³ Thus, if the party with the smaller claim files first in state court, the

366. *See Id.* at 1189-93.

367. *Id.* at 1192-93.

368. *San Antonio Suburban Irrigated Farms v. Shandy*, 29 F.2d 579, 581 (D. Kan. 1928).

369. *See generally* 28 U.S.C. § 1447(c) (2000) (stating that a plaintiff who obtains a remand order may be awarded his costs and attorneys' fees).

370. *See, e.g., Booth v. Furlough, Inc.*, 995 F. Supp. 629, 633 (E.D. Va. 1998) (asserting that a defendant faced with obvious removal grounds must remove or waive his right to do so).

371. *See* 28 U.S.C. § 1446(b) (2000) (noting that a "case may not be removed on the basis of jurisdiction . . . more than 1 year after commencement of the action").

372. *See generally* *Spectacor Mgt. Group v. Brown*, 131 F.3d 120, 121 (3d Cir. 1997); *McPherson v. Brinecell, Inc.*, 98 F.3d 1241 (10th Cir. 1996); *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir. 1984).

373. *See, e.g., Kenray, Inc. v. Judson Atkinson Candies, Inc.*, No. NA02-132-C B/H, 2002 WL 2012439, at *4 (S.D. Ind. Aug. 28, 2002); *FLEXcon Co., Inc. v. Ramirez Commercial Arts, Inc.*, 190 F. Supp. 2d 185, 187 (D. Mass. 2002); *Al-Cast Mold & Pattern, Inc. v. Perception, Inc.*, 52 F. Supp. 2d 1081, 1083 (D. Minn. 1999); *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1254 (5th Cir. 1998); *Davis v. Mut. of Omaha Ins. Co.*, 290 F. Supp. 217, 220 (W.D. Mo. 1968).

matter is non-removable.³⁷⁴ Conversely, if the party with the larger claim files first in federal court, the case will remain there.³⁷⁵ The result is a race to the courthouse steps.³⁷⁶

The courts have little sympathy for the defendant. For example, one federal district court found that although making federal jurisdiction dependant upon a race to the courthouse was "certainly an undesirable result," the policy of limiting removal dictated that it exclude a defendant's counterclaim from calculation of the amount in controversy.³⁷⁷ Decisions favoring strict construction of jurisdictional statutes over local procedural rules invoke *Shamrock Oil* for support.³⁷⁸

* * *

The aforementioned obstacles to removal are by no means all-inclusive.³⁷⁹ Nor has this article purported to cover all of the procedural games a plaintiff may employ to defeat removal.³⁸⁰ Hopefully, the issues described above provide a flavor of the present state of federal removal practice. To be blunt, removal practice is unfair, unseemly, and inefficient.

V. EVALUATION OF THE CURRENT SYSTEM

A. Widespread Gamesmanship

The current state of removal law is not pleasant. Courts apply presumptions against removal with strictness and vigor.³⁸¹ This results in a web of judicially created obstacles that subvert a defendant's right to litigate in a federal forum.³⁸² Of course, the existence of procedural obstacles does not, standing alone, necessarily indicate a problem with current removal practice. If Congress elected to do so, it could, within

374. See *Kenray*, 2002 WL 2012439 at *4; *FLEXcon*, 190 F. Supp. 2d at 187; *Al-Cast*, 52 F. Supp. 2d at 1083; *Greenberg*, 134 F. 3d at 1254.

375. See generally 28 U.S.C. § 1332(9) (2000) (stating that the amount in controversy must exceed \$75,000).

376. See *infra* note 377 and accompanying text.

377. *Maloon v. Bancorpsouth Bank, Inc.*, No. 01-1366, 2002 WL 1397266 at *3-4 (W.D. Tenn. Mar. 29, 2002).

378. See, e.g., *id.* at *3-*4 (citing *Shamrock Oil*); *Al-Cast*, 52 F. Supp. 2d at 1083 (citing *Shamrock Oil* for proposition that removal must be narrowly construed).

379. See, e.g., *Willingham v. Creswell-Keith, Inc.*, 160 F. Supp. 741, 743-44, W.D. Ark. 1958) (suggesting that a case should be remanded where defendant removed to the wrong division within the correct federal district).

380. See, e.g., *Briddelle v. T&J Foods, Inc.*, 18 F. Supp. 2d 611, 612 (D. Md. 1998) (attempting to defeat removal, plaintiff split related causes of action into two separate state court cases to prevent removal of state law claim).

381. See *supra* notes 237-38 and accompanying text.

382. See *supra* Part IV.B.

the confines of equal protection and due process, construct a host of procedural traps to make removal exceedingly difficult.³⁸³ Arguably, Congress could abolish removal jurisdiction altogether.³⁸⁴

The aforementioned obstacles do not, however, result from laws enacted by Congress; rather, they result from judicial gloss created by the application of presumptions against removal to statutory language.³⁸⁵ For example, when determining the amount in controversy for purposes of removal, nothing in the federal statutes prohibits a court from considering a compulsory counterclaim.³⁸⁶ Additionally, nothing in the language of the removal statutes clearly requires the consent of all defendants before removal.³⁸⁷ Nor does any statute preclude the application of traditional equitable exceptions to the one-year limit on removal found in Section 1446 of 28 U.S.C.³⁸⁸ Instead, federal courts have created these and other obstacles as a result of the application of strict presumptions against removal.³⁸⁹

In effect, ordinary rules of statutory construction have been turned on their heads. Rather than seeking to interpret removal statutes in a manner consistent with equity and common sense, courts apply a strict construction to removal statutes even when it leads to patently unfair results.³⁹⁰ Rather than seeking to achieve a statutory construction that furthers a longstanding congressional desire for fair and uniform procedures, courts justify confusion and arbitrary results with the assurance that removal must be limited.³⁹¹ Moreover, many courts seem

383. See U.S. CONST. Art. I, § 8, cl. 18.

384. *Id.*

385. See *supra* notes 211-13 and accompanying text.

386. Cf. *Swallow & Assocs. v. Henry Molded Prods., Inc.*, 794 F. Supp. 660, 663 (E.D. Mich. 1992). *Swallow* takes note of the presumption against removal, but suggests that the statutes may be construed strictly, yet it also allows the damages pled in a compulsory counterclaim to be included:

Against inclusion is the argument that the Congress has demonstrated an intent to limit the removal and diversity jurisdiction of the federal courts. Since the removal and diversity statutes do not specifically permit consideration of any counterclaims, the statutes should be interpreted strictly to prohibit such consideration and defeat removal jurisdiction that is based on the damages pled in the compulsory counterclaim.

Id.

387. See generally 28 U.S.C. §§ 1441, 1446-1448 (2000).

388. See *id.*

389. See *supra* Part IV.

390. See *supra* note 30 and accompanying text.

391. See *supra* note 30 and accompanying text.

entirely undisturbed by the fact that defendants' constitutionally based removal rights are routinely destroyed by lawyers' procedural games.³⁹²

Presumptions against removal have created a system in which procedural gamesmanship is rewarded, and where form is elevated over substance.³⁹³ That same system has also created rampant confusion and splits among the courts. In short, the practical effect of judicially created presumptions has been a state of judicial chaos.

At a theoretical level, arguably, presumptions of any kind are inappropriate when construing removal statutes. For example, Justice Scalia argued that presumptions necessarily import judicial bias into the simple act of construing language.³⁹⁴ Accordingly, in his view, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."³⁹⁵ Nevertheless, one need not adopt Justice Scalia's views of statutory interpretation to reach the conclusion that judicial presumptions against removal are inappropriate. For the policy arguments underlying those presumptions are simply not tenable.

B. Excuses for Gamesmanship

1. The Plaintiff's Supposedly Superior Right to Select the Forum

Strict construction of removal statutes is often excused on the grounds that a plaintiff possesses a superior "right" to select the forum of his choice.³⁹⁶ However, little attention has been paid to the basis for this supposed "right." It is not found in the text of the Constitution.³⁹⁷ To the contrary, the Constitution draws no distinctions between plaintiffs and defendants.³⁹⁸ Rather, it authorizes categories of potential federal jurisdiction and leaves for Congress the decision of how to implement that jurisdiction.³⁹⁹ Thus, federal question jurisdiction exists only because Congress authorized the federal courts to exercise that jurisdiction

392. See, e.g., *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001) (stating that "in the removal context, faithful adherence to the statutory language is more important than avoiding potential unfairness"); *Fenton v. Food Lion, Inc.*, No. Civ.A.3:02CV00017, 2002 WL 1969662, at *6 (W.D.Va. Aug. 23, 2002) (remanding the case but commenting that "if not for the procedural failures in the LLC's removal, federal jurisdiction might have been appropriate").

393. See, e.g., *supra* note 380 and accompanying text.

394. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

395. *Id.* at 23.

396. See *supra* notes 251-54 and accompanying text.

397. See generally U.S. CONST., art III.

398. See generally *id.*

399. See *id.*, art. III, § 2.

beginning in 1875.⁴⁰⁰ Diversity jurisdiction exists, with restrictions, only because of statutory enactments beginning with the first Judiciary Act of 1789.⁴⁰¹

If anything, constitutional principles would appear to refute the notion that plaintiffs possess a superior right to a federal forum. As Justice Story noted long ago in *Martin v. Hunter's Lessee*, the Constitution generally does not discriminate against classes of citizens, but confers equal rights upon all.⁴⁰² Or, in his words, "[t]he constitution of the United States was designed for the common and equal benefit of all the people of the United States."⁴⁰³ Certainly significant tension exists between, on the one hand, a constitutional system that envisions all citizens having access to the federal courts and, on the other hand, judicial presumptions that provide greater access to one class of citizens, plaintiffs, at the expense of another, defendants.

Similarly, Congress has not anointed plaintiffs with a superior right to decide the venue in which to litigate claims implicating federal jurisdiction. There is neither a general statute to this effect, nor an amendment to the removal statutes indicating that Congress ever intended for plaintiffs to enjoy a preferred access to the federal courts. To the contrary, statutory amendments show that Congress consistently has sought to make removal practice fair and balanced.⁴⁰⁴ In sum, there is no textual support for the proposition that plaintiffs possess a superior right to select or avoid federal jurisdiction.

In any event, favoritism towards plaintiffs simply represents bad policy. As Justice Story recognized long ago, it is fundamentally unfair for plaintiffs alone to decide which cases federal courts will hear.⁴⁰⁵ Federal jurisdiction is defined by subject matter, not by the whim of the party who initiates the action. Providing plaintiffs with a superior right to select the judicial forum elevates one party's strategic litigation preference over the structural constitutional principle of equal justice.

Moreover, favoritism toward plaintiffs distorts the substantive character of cases heard by federal courts. For example, the constitutional authorization of diversity jurisdiction was not intended by the Framers to primarily benefit either plaintiffs or defendants, but rather it seeks to protect all citizens who may suffer local prejudice in a foreign court.⁴⁰⁶ There is no reason to believe that a defendant in a

400. See *supra* Part II.C.

401. See *supra* Part II.B.

402. *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816).

403. *Id.*

404. See *supra* Part II.F.

405. See *supra* notes 402-03 and accompanying text.

406. See *supra* notes 48-53 and accompanying text.

foreign court faces less risk of such prejudice than a plaintiff. If anything, the foreign defendant often may be at a greater risk. Nevertheless, removal barriers ensure that federal courts will adjudicate an artificially reduced number of cases in which a defendant fears such prejudice. In short, there is no reason why plaintiffs should enjoy a superior right to forum selection. Such favoritism defies central considerations of judicial impartiality, lacks any textual basis, and produces no perceivable institutional benefits for the judiciary.

2. Federalism

Federal courts incorrectly contend that federalism requires strict limits on removal. The Framers extensively balanced and weighed issues of federalism before drafting a Constitution that envisioned the exercise of diversity jurisdiction by the lower federal courts. Indeed, many of the same men who drafted the Constitution made it one of their first legislative acts to provide both for the creation of lower federal courts and for the exercise of diversity jurisdiction.⁴⁰⁷ These same individuals also thought it was essential to create a mechanism allowing for removal to a federal court. Therefore, removal is not an anomaly at tension with our federal system of government, but rather is an essential component of the original federal scheme created by the Framers. The Constitution, not the removal statutes, imposes limits on state sovereignty. In other words, “federalism,” as defined by the Framers, includes a mechanism for the exercise of removal jurisdiction.

The last 200 years have witnessed a consistent, widespread, and relentless erosion of state sovereignty. For example, state legislatures no longer elect United States Senators, independent state militias have been replaced by a National Guard, and federal statutes and regulations encroach upon hundreds of areas previously considered matters of local concern, such as schools, labor laws, land use regulation, and healthcare. Although these developments would undoubtedly strike many of the Framers as inconsistent with the federal system of government created 200 years ago, one thing that would not surprise them is the exercise of removal jurisdiction by federal courts.

Some courts arguing for a strict construction of removal statutes have suggested that what actually concerns them is not so much the encroachment upon state sovereignty by the federal judiciary but the

407. See Warren, *supra* note 62, at 57 (noting that members of the Constitutional Convention who also served on the Senate Committee drafted the bill for the Judiciary Act of 1789).

unseemliness of one court divesting another court of jurisdiction.⁴⁰⁸ Such concerns hinge more upon judicial courtesy than upon the structural nature of our federal system. In other words, "comity" sometimes is used as a synonym for "federalism."⁴⁰⁹

Nevertheless, the comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far grater concern of state courts may well be that federal courts will relieve the congestion on their own dockets at the expense of state courts.⁴¹⁰ Thus, whether "federalism" concerns are phrased in terms of comity or in the need to protect state sovereignty, they do not provide plausible grounds for judicially created impediments to the exercise of a defendant's removal rights.

3. *Limited Nature of Federal Jurisdiction*

Another reason advanced for restricting removal is the notion that federal courts of limited jurisdiction might expand their own power beyond the prescribed limits. This argument represents the conservative notion of judicial restraint, but restraint in the exercise of removal jurisdiction is no judicial virtue. The Constitution and Congress, not the courts, define the limits of federal jurisdiction. Therefore, it is an abdication by the courts of their institutional role to assume less jurisdiction than Congress has granted them. As Justice Marshall noted:

It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a cases may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.⁴¹¹

408. See, e.g., *Dardeau v. W. Orange-Grove Consol. Indep. Sch. Dist.*, 43 F. Supp. 2d 722, 730 (D.E.D. Tex. 1999); *Bristol-Myers Squibb Co. v. Safety Nat'l Gas. Corp.*, 43 F. Supp. 2d 734, 741 D.E.D. Tex. 1999).

409. See, e.g., *Dardeau*, 43 F. Supp. 2d at 730; *Bristol Meyers*, 43 F. Supp. 2d at 741.

410. See generally Victor E. Flango, *How Would the Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990) (discussing the impact that elimination of diversity jurisdiction would have on the federal caseload).

411. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). See also *Kline v. Murray*, 7 F.2d 404, 406 (D. Mont. 1925) (noting with respect to removal that "[t]oo often has overcaution ceded jurisdiction which ought to be jealously maintained—within valid statutory limits").

In any event, it is senseless to use a procedural device like removal as a mechanism for limiting the substantive reach of federal jurisdiction. Blaming removal for overextending federal jurisdiction is the rough equivalent of scolding the mailman because you receive too much junk mail. In both cases, the complaint is misdirected at the delivery mechanism, not the source.⁴¹²

4. *The Consequences of a Mistake*

Judicial economy and efficiency were the original reasons for imposing restrictions on removal. Ever since *Kessinger* and *Fitzgerald*, federal courts have argued that it is better to decline a case of questionable jurisdiction than to mistakenly assert jurisdiction and render a meaningless judgment.⁴¹³ If a federal court mistakenly retains jurisdiction over a removed case, the parties and the courts admittedly may incur unnecessary costs. If, however, a court incorrectly remands a case over which federal jurisdiction exists, the defendant forever loses his right to a federal forum. Thus removal represents one of the few areas in American jurisprudence where a single judge is given virtually unlimited discretion to decide a party's rights without any possibility of review. This problem was forcefully identified in a 1927 decision from the District of Indiana:

Every court should desire that a reviewing court shall have an opportunity to pass on a doubtful question. It is contrary to the spirit of our Constitution and laws, and repugnant to the sense of fair play so indelibly instilled in the American people, that a judge, who, after all, is a mere man, and subject to the same emotions, passions, and prejudices as other men, should have the right or desire to decide important questions affecting substantial rights of litigants without giving the party feeling aggrieved the right of appeal to some other and higher tribunal, and this should not and will not be done, except in extreme cases, where the necessity is plainly apparent.⁴¹⁴

Thus, as the Eighth Circuit noted in *Boatmen's*,⁴¹⁵ the inability to appeal a remand order provides a compelling reason not to adopt a presumption in favor of remand.

412. *Martin v. Hunter's Lessee*, 14 U.S. 304, 349. Moreover, using restrictions on removal as a device for limiting federal jurisdiction means that defendants alone suffer the consequences of judicial humility. As Justice Story noted, "[s]uch a state of things can, in no respect, be considered as giving equal rights."

413. See *supra* notes 145, 149 and accompanying text.

414. See *Niccum v. N. Assurance Co.*, 17 F. 2d 160, 164 (D. Ind. 1927).

415. See *supra* notes 157-67 and accompanying text.

In fact, and as this article has pointed out, the practical results of restrictions on removal have not furthered judicial economy or efficiency. To the contrary, such presumptions have spawned a system where parties waste significant resources arguing over questions that have divided federal courts for decades. Presumptions against removal also have led to the creation of removal barriers that encourage procedural gamesmanship and decrease public confidence in the judicial system. Contrary to the expectations of decisions like *Kessinger* and *Fitzgerald*, it is the presumption against removal that has led to "a practice that protracts and fosters litigation and multiplies costs."⁴¹⁶

VI. SUGGESTIONS FOR A CHANGE

A. *Abandonment of Presumptions Against Removal*

As a practical matter, the current state of federal removal jurisdiction presents the legal system in a less than positive light. Plaintiff's lawyers play games attempting to avoid federal jurisdiction, while clients spend enormous sums of money fighting technical battles. Congress consistently strives to make the removal process both fair and uniform, however, today it is neither. As one district court aptly noted, "[t]his cannot be what Congress had in mind. Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it."⁴¹⁷ Additionally, as Justice Frankfurter remarked: "[W]hile exercises in procedural dialectics so rampant in the early nineteenth century still hold for me intellectual interest, I do not think they should determine litigation in the middle of the twentieth, even when based merely on diversity of citizenship."⁴¹⁸

Assuming that agreement can be reached that removal practice is flawed, the focus should turn to repairing the system. Instinctively, one might argue that Congress should decide whether the problems associated with removal jurisdiction are severe enough to warrant remedial legislation. Academic commentators have often argued for legislation designed to address one or more problems associated with the federal removal law.⁴¹⁹ Similarly, in 1988, the American Law Institute

416. *Fitzgerald v. Mo. Pac. Ry. Co.*, 45 F. 812, 821 (D. Neb. 1891).

417. *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F. 2d 924, 928 (4th Cir. 1992).

418. *Chicago, Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 586 (1954) (Frankfurter, J., dissenting).

419. See, e.g., Wasserman, *supra* note 106 (proposing amendment to permit review of remand orders).

advanced a proposal to abandon the one-year limit on the removal of diversity cases.⁴²⁰

Nevertheless, such arguments mistake both the cause of current problems and the likelihood that corrective legislation could provide a quick fix. Upon reviewing the procedural anomalies that have crept into federal removal law, it becomes apparent that fault lies not with legislative drafters, but with the federal judiciary. In applying the most rigid presumptions against removal, federal courts have transformed the removal practice into an absurd test that even experienced litigators routinely fail. Because legislation did not create the existing problems, no reason should prompt the belief that further legislation will solve those problems.⁴²¹

Realistically, to restore removal practice to its original constitutional role, nothing less than a fundamental judicial change of heart is required. Federal courts should abandon the presumptions they have created and view questions of removal practice in a fair and neutral manner. Perhaps, if federal judges reviewed the history of federal removal practice, they too would find it inappropriate to defer to a plaintiff's "supposedly" superior right to select the judicial forum. Instead, they might be persuaded by the long-held view that removal is a vital structural component of the American judicial system empowered by the constitution. They might even resurrect the previously held belief that a defendant has a constitutional right to remove certain cases to federal court. At a minimum, the rampant gamesmanship sanctioned under the current removal scheme should cause federal courts to critically examine the policy arguments used to justify presumptions against removal. The goals courts seek through restricting removal must be weighed against the institutional harm inflicted by a system that encourages procedural maneuvering and deceptive practice.

It might appear wildly unrealistic to hope for such a fundamental transformation of judicial attitudes that have become deeply entrenched over the course of half a century. But the case is not a hopeless one. The

420. See American Law Institute (ALI), Federal Judicial Code Revision Project, 142 Tentative Draft. No. 3 (Apr. 30, 1999).

421. For example, Congress could decide to enact an amendment that makes it clear that the one-year bar to removal of diversity cases is subject to equitable exceptions. That amendment, of course, would be interpreted by the same federal courts that have erected barriers to removal in the first instance. How likely is it that these same courts will interpret a statute allowing equitable exceptions broadly? Is it more likely that longstanding judicial presumptions against removal would require a strict construction of any amendment? Wouldn't the policy justifications repeatedly voiced by the courts (federalism, efficiency, etc.) require a strict construction? And, even if the courts did construe a particular remedial statute liberally, wouldn't new judicially created procedural barriers to removal simply emerge in the future?

Supreme Court decision in *Murphy Brothers* quite dramatically demonstrates that courts can implement Congress's desire that removal practice be fair, uniform, and balanced. All that is required is a commonsense approach to statutory interpretation that does not always begin with a presumption favoring remand.

B. Eliminating Removal Traps

It is beyond the scope of this article to consider every area of removal practice that could benefit from the abandonment of the presumption against removal. Each of the judicially created barriers discussed in this article has its own historical, political, and practical implications. Nevertheless, it is appropriate to mention a few areas where, in the author's opinion, judicial reform is most necessary. Prime candidates for reform include:

1. Equitable Exceptions to the One-year Bar on the Removal of Diversity Actions.

Currently, no statutory prohibition exists against the application of traditional equitable exceptions to the one-year bar when a plaintiff has engaged in gamesmanship to defeat removal. The single most important step the courts could take to reduce procedural manipulation would be to follow *Tedford* and allow equitable exceptions when necessary.

2. The Rule of Unanimity.

Nothing in the removal statutes suggest that a plaintiff may defeat a defendant's removal rights by selectively orchestrating the timing of service upon defendants. To prevent such gamesmanship, courts should allow removal to occur within thirty days of service upon the last-served defendant.

3. Application of the Well-Pleaded Complaint Doctrine.

The Well-Pleaded Complaint doctrine is a judicial creation that appears reasonable when the party seeking to invoke federal jurisdiction is the same party that drafted the operative pleading. However, courts should apply the rule less stringently when a plaintiff drafts his complaint in a manner designed to defeat a defendant's right to removal.

4. Calculation of the Amount in Controversy.

The calculation of the "amount in controversy" with regards to removal cases is a topic that requires greater consideration. At a minimum, courts that consider the defendant's compulsory counterclaim

when calculating the amount in controversy for cases filed in federal court should apply the same rule to cases removed to federal court.

